TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 153.

ELEANORA D. SPEER, IN HER OWN BEHALF AND BY EMORY SPEER, HER HUSBAND AND NEXT FRIEND; JAMES MOSHER, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, AND ANNA M. MOSHER, APPELLANTS,

vs.

MICHAEL J. COLBERT, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 3, 1905.

(19,587.)

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In the Court of Appeals of the District of Columbia.

MICHAEL J. COLBERT, Trustee, ET AL., Appellants, vs. ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, ET AL. vs. JOHN D. WHITNEY ET AL. } No. 1369.

and

ELEANORA D. SPEER, Appellant, vs JOHN D. WHITNEY ET AL. } No. 1370.

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a Supreme Court of the District of Columbia.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend, Complainants, vs. JAMES MOSHER and MICHAEL J. COLBERT, Trustees, *et al.*, Defendants. } No. 22100. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint. Filed March 5th*, 1901.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend, vs. JAMES MOSHER, MICHAEL J. COLBERT, Trustees, *et al.* } In Equity. No. 22100, Dock. 50.

1. Eleanora D. Speer, wife of Emory Speer, in her own behalf and by her husband and next friend Emory Speer, both citizens of the

United States and residents of the city of Macon, Bibb county, Georgia, brings this her bill of complaint against James Mosher and Michael J. Colbert, substituted trustees under the will of Ethelbert Carroll Morgan; the said James Mosher being a citizen of the United States resident in the city of New York, and the said Michael J. Colbert being a citizen of the United States resident in the city of Washington, District of Columbia; and against John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, and Edward I. Devitt representing themselves to be the President and Directors of Georgetown College, and against St. Vincent's Orphan Asylum, a corporation resident in the District of Columbia, and the Trustees of St. Joseph's Male Orphan Asylum, a cor-
2 poration resident in the District of Columbia, and against Anna M. Mosher a resident of the city and State of New York.

2. And thereupon, your oratrix complains and says that Ethelbert Carroll Morgan, late of the District of Columbia, died testate on the fifth day of May, 1891, and his last will and testament which was made and dated thirteen days prior to his death, was duly admitted to probate and record and letters testamentary were duly granted to William J. Stephenson and John H. Magruder, the executors thereof, who were duly qualified as such executors, and thereafter said Stephenson died leaving said Magruder surviving executor of said last will and testament, as will at large appear by the records and proceedings in the cause No. 4423 in the supreme court of the District of Columbia holding a special term for orphan's court business.

3. That the said Ethelbert Carroll Morgan was the son of James E. Morgan, late of the District of Columbia, who died on the 2nd day of June, 1889, testate and whose last will and testament was duly admitted to probate and to record, and which will was duly construed by this court in equity cause No. 18,045, and decrees for the distribution of the estate of James E. Morgan entered therein. That said James E. Morgan died seized and possessed of both personal property and real estate, some of said real estate was situated in the State of Maryland but the greater portion thereof was
3 in the District of Columbia. That Ethelbert Carroll Morgan was a legatee in said will, and under said decree of distribution, his share in the personal estate of his father was paid over to John H. Magruder, surviving executor as aforesaid.

4. That said Ethelbert Carroll Morgan in his said will, after making certain specific bequests, appointed William J. Stephenson and John H. Magruder, trustees for all the rest of his estate, to hold the same on certain uses and trusts in said will specified. That under the decree of this court in equity cause No. 16,147, said James Mosher and Michael J. Colbert were substituted as trustees under said will in place of John H. Magruder who resigned and William J. Stephenson deceased.

5. That said Ethelbert Carroll Morgan died seized and possessed of both real estate and personal property in the District of Colum-

bia, besides his share in his father's estate. That said real property of the estate of Ethelbert Carroll Morgan, other than his share in his father's estate passed into the possession of James Mosher and Michael J. Colbert, substituted trustees as aforesaid, and the said personal estate of Ethelbert Carroll Morgan left in trust as aforesaid, other than that derived from his share in his father's estate, passed into the possession of John H. Magruder surviving executor as aforesaid, and by him was paid over to the said James Mosher and Michael J. Colbert, substituted trustees as aforesaid.

4 That the said real and personal property derived from the individual estate of Ethelbert Carroll Morgan as aforesaid so held on April 1, 1900, by the said James Mosher and Michael J. Colbert, trustees as aforesaid, consisted of the following property:

Individual Estate of E. Carroll Morgan.

Real estate.

House No. 918 E St. N. W., Washington, assessed at.....	5,800.00

Personal estate.

Mortgage notes, J. M. Dove, 5 % March and September, par.....	13,304.10	
U. S. Electric Light bonds, 5 and 6 % May and November, par.....	3,000.00	
Mortgage notes, Sara A. White, 5 % par.....	1,000.00	
Mortgage note, John M. Dunn, 6 % par.....	500.00	
		17,804.10
		23,604.10

The said property so in the hands of said James Mosher and Michael J. Colbert, substituted trustees as aforesaid, on April 1, 1900, being still in their hands, besides the income accrued thereon, the exact amount of which your oratrix is unable to state.

6. Your oratrix further avers and charges that the said James Mosher and Michael J. Colbert substituted trustees as aforesaid, have received the share of Ethelbert Carroll Morgan in the estate of James E. Morgan, deceased, under the decree of distribution in equity cause No. 18045 as aforesaid, and on April 1, 1900, held in their possession the said share or proceeds thereof, as follows:

5 *Share of E. Carroll Morgan from Estate of James E. Morgan.*

Real estate, District of Columbia.

Lots Nos. 227 and 229 Express alley, valued at		1,412.00
Lot No. 1114 F. street N. W., one-sixth undivided interest, valued at		9,000.00
Lot No. 1222 New York avenue sold and proceeds invested and held by said James Mosher and Michael J. Colbert, substituted trustees, as follows:		
Mortgage note of Shea, 5% January and July	4,000.00	
Mortgage note, Drury 5% April and October	7,500.00	
Mortgage note of Dos Passas, 5% June and December	2,500.00	
Mortgage note, Dalton 6%	660.66	
Cash	254.67	
		14,915.33
		25,327.33

Personal estate in District of Columbia.

4% U. S. consol bonds, April, July, October, January par		11,000.00
4½% S/O Georgia bonds, January and July par		1,000.00
4% bond, Hartford Run, January and July, par		10,000.00
Proceeds State of Maryland bond	509.13	
Cash from Magruder, executor	3,165.65	
Income collected by trustees to April 1, 1900	1,322.22	
Invested in Sara A. White mortgage note		5,000.00
Cash on hand April 1, 1900, from income		477.83
		27,477.83

Said trustees now having said properties in their hands, and in addition thereto the income accrued thereon since April 1, 1900.

From Maryland property.

Dec. 31, 1900. Proceeds of sale Maryland real estate:

Baltimore ground rents	1,786.76

6 7. That the property owner by the said Ethelbert Carroll Morgan at his death (other than his share in his father's estate) which said Ethelbert Carroll Morgan devised and bequeathed to his said trustees, he directed in his will should be held by his trustees on the uses and trusts as follows:

(*a*.) To apply the income and profits to the use and benefit of his two sisters, your oratrix Eleanora Speer and Minnie Mosher (otherwise known as Anna M. Mosher), in equal parts, during their lives

and at their death to deliver and convey each sister's share to her issue, and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue, if any survive her.

(*b.*) And if his said two sisters shall both die leaving no issue living at their deaths, he directs his said trustees to deliver and convey all the said rest residue and remainder of his estate (excepting his share aforesaid under his father's will) to Georgetown university in the District of Columbia to be an endowment in equal shares of the literary and medical department thereof.

That the said Ethelbert Carroll Morgan devised and bequeathed in his said will his share in his father's estate to his said trustees to be held on the uses and trusts, as follows:

(*c.*) To pay and see to the application of the sum of ten thousand dollars ($10,000) to Georgetown university in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan fund.

(*d.*) A sum not to exceed five thousand dollars ($5000) to be applied and expended under the personal supervision of his trustees to the purchase and erection of a chime of bells and either a side altar or memorial window for some one Catholic church, said church to be in the District and to be designated by his mother by her last will or otherwise.

(*e.*) And if his mother fails so to do he directs his trustees
7 to donate the same to some Catholic church giving a preference if there be one built by the Jesuits.

(*f.*) And if the foregoing gift be void he directs said sum not exceeding $5000 shall be equally divided between St. Vincent's and St. Joseph's Catholic orphan asylums in the city of Washington.

(*g.*) To pay and see to the application of:

A sufficient sum not to exceed three thousand dollars the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown university, otherwise in some medical college in the District to be known as the E. Carroll Morgan scholarship.

(*h.*) To pay and see to the application of:—

The sum of five thousand ($5000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as said testator might thereafter verbally indicate to his trustees, or if he failed to so indicate, then as his trustees with the advice of proper persons might decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of his will (*g* and *h* above) shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or public school of the

District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

(*i.*) And lastly as to all the rest and residue of his aforesaid share of his father's estate his trustees, their heirs and assigns shall hold the same for the benefit of his aforesaid sisters Eleanora and Minnie upon the same limitations, conditions, remainders and powers and in the same manner as the trustees under his father's will then hold retain and possess the "remainder" and bulk of the respective shares of his said two sisters.

The letters (*a,*) (*b,*) (*c,*) etc., being used above to indicate the paragraphs of the will, not being in the will itself but used herein to designate the particular paragraphs referred to for convenience of reference. A copy of said will being hereto attached, marked Exhibit A, to which the usual leave of reference is prayed.

8 8. Under the will of said James E. Morgan as construed by this honorable court in equity cause No. 18045, the trustees under said will hold retain and possess the remainder and bulk of the share of said Eleanora Speer in trust to hold and invest and the rents, issues, income and profits thereof to pay to said Eleanora Speer during her life, and on the death of said Eleanora Speer to pay and give in absolute estate by such conveyance or other instrument as may be necessary to her issue the whole of said share principal and interest, or if said Eleanora Speer shall die without issue living at her death, then to pay and give as aforesaid such share to such person or uses as said Eleanora Speer so dying without issue living at her death, shall by her last will and testament indicate or provide. And under said will as construed by this honorable court in said cause No. 18045 the trustees under said will hold retain and possess the remainder and bulk of the share of said Minnie Mosher in trust to hold and invest and the rents issues income and profits thereof to pay to said Minnie Mosher during her life, and on the death of said Minnie Mosher to pay and give in absolute estate by such conveyance or other instrument as may be necessary to her issue the whole of said share principal and interest, or if said Minnie shall die without issue living at her death, then to pay and give as aforesaid such share to such person or uses as said Minnie Mosher so dying without issue living at her death, shall by her last will and testament indicate or provide.

9 9. Your oratrix is further informed that the corporation known as St. Vincent's Orphan Asylum in the District of Columbia and the Trustees of St. Joseph's Male Orphan Asylum in the District of Columbia claim to be the beneficiaries under said clauses of said will of Ethelbert Carroll Morgan in which it is claimed a legacy is left to be equally divided betwee St. Vincent's and St. Joseph's Catholic orphan asylums in the ci f Washington. Your oratrix makes the said St. Vincent's Orphan Asylum and the said The Trustees of St. Joseph's Male Orphan Asylum defendants hereto that they may make proof of their identity if any exists with the said St. Vincent's and St. Joseph's Catholic orphan

asylums mentioned in said will and that they may be bound by the adjudication which may be made in respect thereto.

10. Your oratrix further avers and charges that there is no corporation or institution in the District of Columbia having the name of Georgetown university or University of Georgetown, although your oratrix is informed there are several colleges in the District of Columbia claiming to be universities. Your oratrix is informed that the defendants under the name of The President and Directors of Georgetown College in the District of Columbia claim to be the beneficiary entitled to the legacies mentioned in said will as for Georgetown university.

10 Your oratrix avers and charges that by act of Congress of June 10, 1844, James Rider, Thomas Lilly, Samuel Barber, James Curley and Anthony Rey were declared to be a body politic and corporate, with perpetual succession in deed or in law to all intents and purposes whatsoever by the name and title of the President and Directors of Georgetown College.

Your oratrix is informed and believes and so charges that the said persons so incorporated are long since dead; that whether the succession to the original incorporators has been maintained or not your oratrix is not informed, but your oratrix is informed that said John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker and Edward I. Devitt claiming to be by succession the President and Directors of said Georgetown College, are claiming an interest in the estate of said Ethelbert Carroll Morgan under the clauses of his will mentioning Georgetown university in the District of Columbia, and your oratrix makes them defendants hereto that they may make proof of their succession to the original incorporators of said Georgetown college and that their claims to such legacies may be adjudicated by this court in this cause.

11. Your oratrix avers and charges that there is no chartered institution in the District of Columbia having the name "Georgetown university" or "the University of Georgetown," but your oratrix is not ignorant of the fact that an institution of learning has for a number of years been conducted and controlled by the Order

11 of Jesuits, otherwise known as the Society of Jesus, in Georgetown in the District of Columbia, and was so conducted at the time of the making of the will of said Ethelbert Carroll Morgan, and at the time of his death, and is now being conducted by the said John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker and Edward I. Devitt under the name of the President and Directors of Georgetown College.

The annual catalogues for a number of years issued for said institution of learning state the history and purposes of the said institution, as follows:

"Upon the reorganization of the Society of Jesus in Maryland in 1805, the Georgetown college as it had already begun to be called, was transferred to the fathers of that society, under whose control and direction the university still remains.

"Georgetown university at present consists of the college, the

school of medicine and the school of law. The college however comprises in itself four distinct departments, viz: The graduate school, the collegiate or undergraduate department, the preparatory department and the astronomical observatory. Every one of the schools and departments except the preparatory is under the direction of its own dean, and every faculty has the power of legislating on its own affairs; but this power can be exercised only in subordination to the president and directors of the university, and subject to their approval."

"Religious instruction is considered of the first importance in education. Catechism forms one of the regular class recitations, and weekly catechetical lectures are attended by all. The prize for Christian doctrine is awarded to the author of the best paper upon the matter of these lectures. Further instruction is given to such as have need for it or are preparing for the sacraments. For the development of piety there are two sodalities which meet weekly. All Catholic students are expected to approach the sacraments at least once a month."

"No distinction is made in the reception of students on the ground of religious belief, but all the boarders are required to be present at the public exercises of religion."

And your oratrix avers and charges that at the time of the
12 making of said will of Ethelbert Carroll Morgan and ever since to the present time the teaching and practice in said institution has been in accordance with the statements in said catalogues as aforesaid and the principles and methods of the Society of Jesus.

12. Your oratrix avers and charges that at the time of the making of the said will of Ethelbert Carroll Morgan and at the time of his death, by virtue of the laws of force in the District of Columbia

"Every gift, sale or devise of lands to any minister, public teacher or preacher of the gospel as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination; every gift or sale of goods or chattels to go in succession or to take place after the death of the seller or donor to or for such support, use or benefit, and also every devise of goods or chattels to or for the support, use or benefit of any minister, public teacher, or preacher of the gospel as such, or any religious sect, order or denomination, without leave of the legislature,"

are declared to be void and of no effect unless such gifts and devises described in said provision of the law just quoted

"shall be made at least one calendar month before the death of the donor or testator"

(See section 457 Revised Statutes, Dist. of Col.)

And your oratrix avers and charges that by reason of the said provisions of law, the limitation over to Georgetown university in

the District of Columbia in clause of the will heretofore designated as clause (*b*) is void and ineffective, as well as the other special legacies hereinbefore mentioned in this bill, to said George-
13 town university or University of Georgetown, because the same are gifts and devises for the support use and benefit of a religious sect, order and denomination and to a public teacher of the gospel as such made within one calendar month before the death of the testator.

And your oratrix further avers and charges that by reason of that fact, and the indefinite character of said special legacies hereinafter more particularly enumerated, the said limitations and special legacies for religious and pious uses were and are impracticable and incapable in law or equity of being carried into execution.

While your oratrix is willing and desirous of making such reasonable concessions as will do justice to the general intent of the testator to devote a portion of his estate to pious uses, your oratrix avers and charges that unless the said will is construed by this honorable court in accordance with the recognized rules of law applicable to the same, that not only will the real intent of the testator be not carried out, but the interests of your oratrix and others interested in said estate will be so tied up, embarrassed and beclouded, that the estate will be of little benefit to any of the parties or objects in contemplation of the benevolence of said testator.

Your oratrix specifies more particularly the limitations and devises and legacies in said last will and testament of said Ethelbert Carroll Morgan which are not effective, as follows:

14 13. The limitation over of that portion of his estate not his share in his father's estate, to Georgetown university upon the death of said Eleanora Speer and Minnie Mosher without issue living at their death, see paragraph designated (*b*) above, is void, because there is no Georgetown university in the District of Columbia, unless it be the institution conducted and controlled by the religious order aforesaid under the name of the President and Directors of Georgetown College, and if the latter be intended it is a gift and devise for the support use and benefit of a religious sect, order and denomination and to a public teacher of the gospel as such, and the gift and devise was not made at least one calendar month prior to the death of said Ethelbert Carroll Morgan.

14. The direction in said will of Ethelbert Carroll Morgan to his trustees to pay Georgetown university ten thousand dollars from his share in his father's estate, to be used in the prosecution of research in the colonial history of Maryland and the District of Columbia, and obtaining and preserving archives and papers relating thereto, and to see to the application of the same, see paragraph designated as (*c*) above, is void,

(1.) Because said will, gift and devise was not made at least one calendar month prior to the death of the testator.

15 (2.) Because there is no chartered power in any institution which could take under the name of Georgetown university,

authorizing it to prosecute such research and obtain and preserve such archives and papers.

(3.) Because the nature of the research, its object and the character of the archives and papers are too indefinitely and vaguely stated.

(4.) Because the trust would not promote or attain a charitable or eleemosynary end.

(5.) Because the trust was not intended to be an executed one on the payment of the stated sum to the university, but was a continuing trust in which the application of the fund was left to the personal discretion of his trustees and the power has lapsed if it ever was effective, by reason of the death of one original trustee and resignation of the other.

15. Your oratrix further avers and charges that the direction in said will of Ethelbert Carroll Morgan to his trustees to pay a sum not to exceed five thousand dollars to be applied under the personal supervision of his trustees to the purchase and erection of a chime of bells, and either a side altar or memorial window for some one Catholic church in the District of Columbia to be designated by his mother, see clause (*d*) above, is void,

(1.) Because no particular church was named,

(2.) Because his mother died without naming any particu-
16 lar church.

(3.) Because a gift or devise to a church if any particular corporation were named, would be a gift or devise for the support use and benefit of a religious sect, order and denomination and be a devise that was not made more than a calendar month prior to the death of the testator.

(4.) That the devise was not of any particular sum, and the amount to be applied, as well as the manner of its application and selection of the church was left to the personal discretion of the trustees named in said will, one of whom is dead and the other has resigned, and the power to designate the sum to be used, the church to be benefited and the manner of its application was a personal power which ended with the death and resignation of said trustees as aforesaid.

16. Your oratrix further avers and charges that the direction to the trustees in said will of Ethelbert Carroll Morgan that if his mother should fail to name the church as in the clause last above mentioned, then the trustees should donate the said sum not to exceed five thousand dollars to some Catholic church, giving preference if there should be one built by the Jesuits, see clause (*e*) above, is void,

(1.) Because no particular church was named and the bequest or devise is too indefinite.

(2.) Because the power to name a particular church if ef-
17 fective at all was a personal power which died when William J. Stephenson the trustee named in the will died, and when the other original trustee resigned.

(3.) Because the sum to be donated is not definitely stated nor is the object of the donation sufficiently defined to fix the amount, and

there is no power in the substituted trustees to donate any particular sum, the power to fix the particular sum being a discretion reposed personally in the trustees named in the will.

(4.) Because it was a gift and devise for the use and benefit of a religious sect order and denomination and to a public teacher of the gospel as such and made within one calendar month prior to the death of the testator.

17. Your oratrix avers and charges that the direction to the trustees in said will of Ethelbert Carroll Morgan that if the foregoing gift be void, he directs said sum not to exceed five thousand dollars shall be equally divided between St. Vincent's and St. Joseph's Catholic orphan asylums in the city of Washington, see clause designated (*f*) above, is void,

(1.) Because no particular sum is named nor is the particular use sufficiently stated to fix the amount.

(2.) Because the power to designate any particular sum for donation if effective at all expired with the death of one trustee and resignation of the other as aforesaid, and did not pass to the substituted trustees.

(3.) Because there is no such asylum in the city of Wash-
18 ington as St. Vincent's Catholic orphan asylum, or St. Joseph's Catholic orphan asylum, or St. Vincent's and St. Joseph's Catholic orphan asylums.

(4.) Because if the said gifts were intended for the corporation known as St. Vincent's Orphan Asylum, and a corporation known as the Trustees of St. Joseph's Male Orphan Asylum in the District of Columbia, it was a gift and devise for the support use and benefit of a religious sect order denomination and public teacher of the gospel within the meaning of the prohibition in the laws of the District of Columbia, prohibiting such gift or devise within one calendar month prior to the death of the testator.

18. Your oratrix further avers and charges that the direction to the trustees in said will of Ethelbert Carroll Morgan to pay a sufficient sum not to exceed three thousand dollars to the maintenance of a scholarship in the study of medicine, preferably in Georgetown university, otherwise in some medical college in the District and to see to the application of the same, see paragraph designated (*g*) above, is void,

(1.) Because no definite sum is stated and the power to fix a definite sum and to see to the application of it to the object stated was a personal power which expired with the death of William J. Stephenson and the resignation of the other original trustee.

(2.) Because there is no chartered institution having the name of Georgetown university, and if intended for Georgetown col-
19 lege, it is a gift and devise to a religious sect order denomination and public teacher of the gospel, and a devise made within one calendar month prior to the death of the testator.

(3.) Because the discretion to select the particular college in the District of Columbia to which said donation should be made was a discretion personal to the said William J. Stephenson now dead and

the other trustee since resigned and did not pass to the substituted trustees.

(4.) Because if Georgetown university or Georgetown college cannot take, the limitation over to some other college is too indefinite to be carried into execution.

19. Your oratrix further avers and charges that the direction to the trustees in said will of Ethelbert Carroll Morgan to apply five thousand dollars as said testator might thereafter verbally indicate to his trustees or if he failed to so indicate, then as the trustees with the advice of proper persons might decide, to the maintenance of a scientific department, or the founding and application of the income to a scholarship in the classical department in the Georgetown university, see clause designated (*h*) above, is void,

(1.) Because the gift and devise is uncertain as to its object and too indefinite, and depends upon proof of verbal directions given or to be given outside of the will.

(2.) Because it cannot now be determined whether said testator indicated his wishes in the premises verbally to the said William J. Stephenson, the deceased trustee, or not; if he did so indicate, such indication then and there superseded the other provisions of the clause, and since such verbal instructions cannot be given effect the whole devise must lapse.

(3.) Because the specific application of the gift is not therein determined but left with trustees, one of whom is now dead and with other persons who were to be selected and whose competency was to be passed on by said trustee now dead, and the power was one personal to the trustees named in the will and did not pass to the substituted trustees.

(4). Because there is no such corporation as Georgetown University in the District of Columbia, and if Georgetown college is meant, it is a gift or devise for the support use and benefit of a religious sect, order, denomination and public teacher of the gospel made within one calendar month prior to the death of the testator.

20. Your oratrix avers and charges that by reason of the premises the said Ethelbert Carroll Morgan failed to convey by devises or bequests beyond the failure of issue living at the deaths of Eleanora Speer and Minnie Mosher, the remainder interest in his property (other than his share in his father's estate) in which he gave a life interest to Eleanora Speer and Minnie Mosher, see clauses designated as (*a*) and (*b*) above, and therefore said remainder interest in his property not derived from his father's estate devolves upon the heirs at law and next of kin of said Ethelbert Carroll Morgan of whom your oratrix is one.

21. Your oratrix further avers and charges that by reason of the premises the devises and bequests made by said Ethelbert Carroll Morgan from his share of his father's estate herein designated as clauses (*c*), (*d*), (*e*), (*f*), (*g*), and (*h*), lapsed and fell into the residuary clause designated above as clause (*i*) of said will.

22. Your oratrix avers and charges that notwithstanding the premises the said James Mosher and Michael J. Colbert substituted

trustees as aforesaid, are threatening to distribute the estate of said Ethelbert Carroll Morgan on the idea that the said devises and bequests and limitations hereinbefore referred to as void, are in fact effective, and will do so unless restrained and enjoined by the order and decree of this honorable court, to the great and manifest injury of your oratrix.

23. Forasmuch as your oratrix can have no adequate relief except in this court, and to the end therefore that the defendants may if they can show why your oratrix should not have the relief hereby prayed, and full, true, direct and perfect answers make to the matters hereinbefore stated and charged, but not under oath, answer under oath being hereby expressly waived, your oratrix prays as follows:

22 1. That the court will construe the clauses of the said will of said Ethelbert Carroll Morgan hereinbefore designated as clauses (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), and (*i*), and determine the validity and effect of said clauses and if the gifts, bequests and devises specified in all or any of said clauses have lapsed or are ineffective for any reason, will determine the disposition thereof.

2. That the court will in the meantime restrain the said defendants from paying over the gifts, bequests and devises specified in the clauses of said will designated as clauses (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), and (*h*), and will upon final decree perpetually enjoin the defendants from paying over such lapsed and ineffectual gifts, bequests and devises as indicated in said clauses otherwise than to the persons or corporations entitled thereto as decreed by the final decree of the court.

3. That the court will decree a distribution of such assets in the hands of the said defendants as are proper to be distributed.

4. May it please your honors to grant unto your oratrix not only a restraining order but in due course a writ of injunction conformably to the prayers of this bill. And your oratrix prays a writ of

23 subpœna of the United States of America directed to the said James Mosher and Michael J. Colbert substituted trustees under the will of Ethelbert Carroll Morgan, and to John D. Whitney, James P. Fagan, Edward McTammany, James P. Becker and Edward I. Devitt representing themselves to be the President and Directors of Georgetown College, and to St. Vincent's Orphans Asylum, and to the Trustees of St. Joseph's Male Orphan Asylum, and to Anna M. Mosher, all resident as set forth in paragraph (1) of this bill, commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem appropriate.

5. May it please your honors to grant unto your oratrix such other and further relief as the nature of her case may require and to the court may seem meet and proper.

ELEANORA D. SPEER.
EMORY SPEER,
Next Friend of Eleanora D. Speer.

MARION ERWIN, *Solicitor.*

24 UNITED STATES OF AMERICA, }
Southern District of Georgia. }

Before the undersigned personally comes Emory Speer who being duly sworn deposes and says that he has read the foregoing bill of complaint, and knows the contents thereof, and that the statement of facts therein is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

EMORY SPEER.

Sworn to and subscribed before me this 28th day of February 1901.

LENOIR M. ERWIN,
Deputy Clerk U. S. Circuit Court and United States Commissioner for the Southern District of Georgia.

[Seal of U. S. Circuit Court, So. District of Georgia.]

25 EXHIBIT A.

Copy of Will.

I Ethelbert Carroll Morgan of the city of Washington and District of Columbia make this my last will and testament hereby revoking all former wills.

After paying my just debts and funeral expenses I give and devise all my property real, personal and mixed as follows

I give to Charles V. Boarman M. D. my Harvard surgical chair and also my sleigh.

To Charles Rabbitt one hundred ($100) dollars.

To my sister Ellanora the crayon of my mother now hanging in my library.

I give to my mother such articles of my personal and household effects and furniture and personal property as she may choose and desire and also all the various articles instruments and books contained in a memorandum prepared by me and desire she will dispose of them or any of them as I have therein designated. I give and bequeath my trotting horse "Staples" and harness to Mrs. Eliza Barber of Charles county Maryland, and also I give her my poultry and direct my executors and trustees to apply and expend a sum not exceeding two hundred and fifty dollars in providing upon Mrs. Barber's place suitable accommodations for the said horse and fowls and in providing for the horse.

I give two thousand ($2000) dollars to each of my sisters Ellanora and Minnie

I give one thousand $1000 dollars to my aunt Olivia Magruder in grateful remembrance of her tender devotion

I give five hundred $500 dollars to Miss Blanch Wolf, if
26 she should die before me I give said sum to her sister Hellen
To Mrs. Maria Wolf I give five hundred ($500) dollars
To Eugene Morgan my watch and chain
To Mrs. Eliza Barber of Charles county Maryland I give five hundred ($500) dollars and to Mrs. Evelina P. Morgan I give five hundred ($500) dollars

I further direct my executors and trustees to cause two copies to be made of the portrait of my father by Armour and present one to the literary department and the other to the medical department of Georgetown university.

All the rest and residue of my estate real, personal and mixed of which I am now possessed or shall possess at my death (other than my share under my father's will of which I would become possessed at my mother's death) I give bequeath and devise to my trustees hereinafter named and their heirs and assigns with full power to sell convey mortgage and reinvest, in trust nevertheless to apply the income and profits to the use and benefit of my sisters Ellanora Speer wife of Emory Speer and Minnie Mosher wife of James Mosher in equal parts during their lives an- at their death to deliver and convey each sister's share to her issue and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her

And if my said two sisters shall both die leaving no issue living
at their deaths I direct my said trustees to deliver and convey
27 all the said rest and remainder of my estate (excepting my
share aforesaid under my father's will) to Georgetown university in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof

I direct my mother my executors and trustees to permit my late student T. Johnson Eliot M. D. whom I desire to succeed me in my specialty to retain and use my three office rooms, together with such surgical instruments medical books furniture and articles as I have designated in the aforesaid memorandum of articles given to my mother, to include the furniture of said rooms, for a period of one year from my death free of rent provided he preserves the same in as good order and condition as he received them and enters into possession, other wise my mother executors and trustees are directed to take possession. And if he in all things complies with this provision he shall at the end of the year have the right to purchase the said instruments books and furniture at an appraisement. And if at the end of the said year my executors and trustees should be satisfied that the said office rooms could be rented without detriment to my estate and the said T. Johnson Eliot so desire I wish them to rent them to him on liberal and advantageous terms.

I further desire that in event my mother does not wish to retain any of the articles enumerated in the memorandum aforesaid and not otherwise designated by me to be disposed of by her that then they be sold and the proceeds be turned over to my executors or trustees.

28 And I hereby give bequeath and devise any and all the estate real personal and mixed devised to me under my father's will and to which I become entitled to have and possess upon my mother's death to my trustees herein after named their heirs and assigns forever with full power to sell convey mortgage encumber and reinvest in trust nevertheless to pay and see to the application of

First the sum of ten thousand ($10000) dollars to Georgetown university in the District of Columbia to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

Second a sum not to exceed five thousand ($5000) dollars to be applied and expended under the personal supervision of my trustees to the purchase and erection of a chime of bells and either a side altar or memorial window or a bell and either a side altar or a memorial window for some one Catholic church * * * said church to be in the District and to — designated by my mother by her last will or otherwise and if she fail so to do I direct my trustees to carry out this trust as a memorial of my mother Nora Morgan and donate the same to some Catholic church * * * giving a preference, if there be one, built by the Jesuits. And in event this clause & gift be void I direct said sum not exceeding $5000 five thousand dollars shall be equally divided between

29 Saint Vincents' and St. Joseph's Catholic orphan asylums in the city of Washington.

Third. A sufficient sum not to exceed three thousand dollars the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown university; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship.

Fourth, the sum of five thousand ($5000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship, to be applied

f

as I may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department, in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

And lastly as to all the rest and residue of my aforesaid share of my father's estate my said trustees their heirs and assigns shall hold the same for the benefit of my aforesaid sisters Ellenora and Minnie upon the same limitations conditions remainders and powers and in

the same manner as the trustees under my father's will, will then hold retain and possess the "remainder" and bulk of the
30 respective shares of my said two sisters I wish my brother Cecil to have my share of my father's library I nominate and appoint William J. Stephenson and John H. Magruder my executors and trustees of this my last will and testament.

In witness whereof I have signed and sealed and published and declared this as my will this 22nd day of April, 1891.

ETHELBERT CARROLL MORGAN, M. D. [SEAL.]

The said Ethelbert Carroll Morgan M. D. having signed and sealed this instrument and published and declared the same as and for his last will we at his request and in his presence and in the presence of each other have hereunto written our names as subscribing witnesses.

G. E. KIRK.
JAMES A. HUNTER.
EDW'D STEVENS.
LEONHARD EGLOFF.

31 *Answer of Michael J. Colbert. Filed June* 11, 1901.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, &c., *vs.* JAMES MOSHER ET AL. } Eq. No. 22100.

For answer to the bill of complaint filed in the above entitled cause, the defendant Michael J. Colbert respectfully states as follows:

1. He admits the matters and things stated in the first paragraph of the bill of complaint.

2. He admits the matters and things stated in the second paragraph of the bill of complaint.

3. He admits the matters and things stated in the third paragraph of the bill of complaint.

4. He admits the matters and things stated in the fourth paragraph of the bill of complaint.

5. He admits the matters and things stated in the fifth paragraph of the bill of complaint.

6. He admits the matters and things stated in the sixth paragraph of the bill of complaint.

7. For answer to the seventh paragraph of the bill of complaint this defendant refers to the original will of Ethelbert Carroll Morgan, deceased now on file in the office of the register of wills for the District of Columbia for an accurate statement of the provisions of said will.

8. For answer to the eighth paragraph of the bill of complaint,

this defendant refers to the original will of James E. Morgan
32 now on file in the office of the register of wills for the District of Columbia for an accurate statement of the provisions of said will.

9. This defendant has no knowledge of the matters and things stated in the ninth paragraph of the bill of complaint, and if the same be material he calls for proof thereof. This defendant states that Saint Vincent's and St. Joseph's Catholic orphan asylums in the city of Washington are named as beneficiaries under the will of said Ethelbert Carroll Morgan, but beyond this, this defendant knows nothing of the allegations contained in this paragraph of the bill.

9-10. Answering the tenth paragraph of the bill of complaint, this defendant states that there is an institution in the District of Columbia known as Georgetown university or the university of Georgetown, as the complainant very well knows. The corporate title of said institution is the President and Directors of Georgetown College incorporated by act of Congress, but the institution is known in the city of Washington and generally throughout the United States as Georgetown university, or the university of Georgetown or Georgetown college, and it is this institution and no other that is named as beneficiary under the will of said Ethelbert Carroll Morgan. This defendant says it is true that the President and Directors of Georgetown College a corporation as aforesaid are claiming as beneficiaries under said will, but he has no knowledge that the defendants Whitney, Fagan, McTammany, Becker and Devitt as individuals are making any claim in the premises.

11. Answering the eleventh paragraph of the bill, this
33 defendant admits that the name "the university of Georgetown" or "Georgetown university" is not the correct corporate title of the institution referred to, but said institution is popularly known as Georgetown university or the university of Georgetown. This defendant has no knowledge of the statements contained in any catalogue issued by Georgetown college and if these allegations be material, he calls for proof thereof.

12. Answering the twelfth paragraph of the bill of complaint, this defendant denies that the limitation over to Georgetown university mentioned in the clause of the will called clause *b* is void or that the other special legacies in said will mentioned to Georgetown university or to the university of Georgetown are void for any reason, and this defendant specifically denies each and every other allegation in this paragraph of the bill contained.

13. This defendant denies each and every allegation contained in the thirteenth paragraph of the bill of complaint.

14. This defendant denies each and every allegation contained in the fourteenth paragraph of the bill of complaint.

15. This defendant denies each and every allegation of fact contained in the bill of complaint, and as to the matters of law therein alleged, he states that he is not called upon to make further answer.

16. This defendant makes the same answer as in the preceding

paragraph of this answer to the allegations of the sixteenth paragraph of the bill.

34 17. This defendant denies that the legacies mentioned in the seventeenth paragraph of the bill are void for any of the reasons therein mentioned.

18. This defendant denies that the legacy mentioned in the eighteenth paragraph of the bill of complaint is void for any reason therein stated.

19. This defendant denies that the legacy referred to in the nineteenth paragraph of the bill of complaint is void for any reason therein stated.

20. This defendant states that the matters and things stated in the twentieth paragraph of this bill of complaint are matters of law which he does not feel himself called upon to answer.

21. Your defendant denies the allegations of law and fact contained in the twenty-first paragraph of the bill.

22. This defendant speaking for himself and not for his co-trustee denies that he ever threatened to distribute the estate of Ethelbert Carroll Morgan, but on the contrary has repeatedly declared his intention not to distribute the estate except under the direction and control of this court.

And having fully answered this defendant prays to be hence dismissed with costs.

MICHAEL J. COLBERT.

HAMILTON & COLBERT,
Sol'rs for Def't.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters
35 and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief, I believe to be true.

MICHAEL J. COLBERT.

Subscribed and sworn to before me this 10th day of June A. D. 1901.

LOUISE F. DYER,
[NOTARIAL SEAL.] *Notary Public, D. C.*

36 *Answer of John D. Whitney et al. Filed June 27, 1901.*

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, ETC., *vs.* JAMES MOSHER ET AL. } Equity. No. 22100.

For answer to the bill of complaint filed in the above entitled cause the defendants, John D. Whitney, James P. Fagan, Edward

McTammany, James B. Becker and Edward I. Devitt, respectfully state as follows:

1st. They admit the matters and things stated in the first paragraph of the bill of complaint.

2nd. They have no personal knowledge of the matters and things stated in the second, third and fourth paragraphs of the bill of complaint, but as said matters are all of record they call for proof thereof by the record.

3rd. They believe the matters and things stated in the fifth paragraph to be true, but for greater certainty they refer to the record for proof thereof.

4th. They have no personal knowledge of the matters and things stated in the sixth paragraph of the bill of complaint, and they call for proof thereof so far as their interests are concerned.

5th. They make the same answer to the seventh paragraph of the bill of complaint, and they further say that the will of Ethelbert Carroll Morgan is on file in the office of the register of wills
37 in the District of Columbia and they refer to the original thereof for proof of its contents.

6th. They have no personal knowledge of the matters and things stated in the eighth paragraph of the bill of complaint, and as said matters are all of record they call for proof thereof by the record.

7th. They have no knowledge of the matters and things stated in the ninth paragraph of the bill of complaint other than that there is an institution in the city of Washington, District of Columbia, known as St. Vincent's Orphan Asylum and another institution known as the Trustees of St. Josephr's Male Orphan Asylum, but they are not advised as to the claims made by said institutions.

8th. Answering the tenth paragraph of the bill of complaint these defendants state that the correct corporate title of Georgetown college is "The President and Directors of Georgetown College," incorporated by act of Congress approved June 10th, 1844; that these defendants are the president and directors respectively of said corporation duly elected and qualified; and they further claim that they claim no interest in the various legacies bequeathed to Georgetown university under the will of Ethelbert Carroll Morgan, deceased, so far as they are individually concerned, but that the President and Directors of Georgetown College do claim said legacies. In and by the fourth section of the act of Congress above-referred to, it was provided, "that no misnomer of said corporation shall defeat or annul any gift, grant, devise or bequest to or in said cor-
38 poration," and they claim that the various legacies bequeathed by said will to Georgetown university or to the university of Georgetown are in fact valid bequests to the President and Directors of Georgetown College. Further answering said paragraph these defendants expressly disclaim any personal interest in the legacies bequeathed to the President and Directors of Georgetown College, and if the rights of that corporation are to be determined by any decree

passed herein they respectfully request that said corporation be made party-defendant hereto.

9th. Answering the eleventh paragraph of the bill of complaint these defendants state that the correct corporate title of said institution is "The President and Directors of Georgetown College," which is variously known throughout the country as Georgetown university or university of Georgetown or Georgetown college. They further state that the affairs of said corporation are managed by a president and board of directors regularly elected and qualified. They believe that the annual catalogues issued by the said institution are correctly quoted in this paragraph of the bill, but for greater certainty they call for proof of these allegations by the original documents.

10th. Answering the twelfth paragraph of the bill of complaint so far as the matters of fact in said paragraph are concerned, the defendants deny that the several bequests in the last will and testament of Ethelbert Carroll Morgan to Georgetown university or to the university of Georgetown are void because the same are gifts and devises for the support and benefit of a religious sect,
39 order or denomination or to a public teacher of the gospel as such; on the contrary they state that the corporation known as the President and Directors of Georgetown College is not a religious sect, order or denomination, neither is it a public teacher of the gospel, but on the contrary it is a body corporate created by act of Congress aforesaid for educational purposes. These defendants are advised that it is not necessary to make further answer to the allegations of this paragraph as they are all conclusions of law, the correctness of which they deny.

11th. They expressly deny all the matters and things stated in the thirteenth paragraph of the bill of complaint.

12th. They expressly and specifically deny each and every of the matters and things stated in the fourteenth paragraph of the bill of complaint.

13th. They expressly deny each and every of the matters and things stated in the fifteenth paragraph of the bill of complaint.

14th. They expressly deny each and every of the matters and things stated in the sixteenth paragraph of the bill of complaint.

15th. They have no connection with the institutions known as St. Vincent's orphan asylum and St. Joseph's male orphan asylum, and they are advised that it is not necessary for them to make further answer to this paragraph of the bill of complaint.

16th. They expressly deny each and every of the allega-
40 tions contained in the eighteenth paragraph of the bill of complaint and further state that these allegations are all conclusions of law, the correctness of which they deny.

17th. They expressly deny each and every of the matters and things stated in the nineteenth, twentieth and twenty-first paragraphs of the bill of complaint.

18th. They have no knowledge of the matters and things stated in the twenty-second paragraph of the bill of complaint, and they

are advised that they are not called upon to answer the matters and things stated in the twenty-third paragraph of the bill of complaint.

And having fully answered they pray to be hence dismissed with costs.

JOHN D. WHITNEY.
JAMES P. FAGAN.
E. McTAMMANY.
JAMES B. BECKER.
EDWARD I. DEVITT.

We do solemnly swear that we have read the foregoing answer subscribed by us, and know the contents thereof; that the matters and things therein stated upon our personal knowledge are true, and the matters and things therein stated upon information and belief we believe to be true.

JOHN D. WHITNEY.
JAMES P. FAGAN.
E. McTAMMANY.
JAMES B. BECKER.
EDWARD I. DEVITT.

41 Subscribed and sworn to before me this 26th day of June, A. D., 1901.

G. PERCY McGLUE,
[NOTARIAL SEAL.] *Notary Public, D. C.*

42 *Answer of the St. Joseph's Male Orphan Asylum. Filed September* 20, 1901.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER *vs.* JAMES MOSHER ET AL. } Equity. No. 22100, Docket 51.

For answer to the bill of complaint filed in the above-entitled cause, the defendant, The Trustees of St. Joseph's Male Orphan Asylum, states as follows:

1. It admits the matters and things stated in the 1st paragraph of the bill of complaint.

2. It admits the matters and things stated in the 2nd paragraph of the bill of complaint.

3. It admits the matters and things stated in the 3rd paragraph of the bill of complaint.

4. It admits the atters and things stated in the 4th paragraph of the bill of cor . int.

5. It admits the matters and things stated in the 5th paragraph of the bill of complaint.

6. It admits the matters and things stated in the 6th paragraph of the bill of complaint.

7. This defendant believes the matters and things stated in the 7th paragraph of the bill of complaint to be true, but for greater certainty refers to the original will of said Ethelbert Carroll Morgan, now on file in the office of the register of wills for the District of Columbia.

43 8. This defendant admits the matters and things stated in the 8th paragraph of the bill of complaint.

9. This defendant says that its corporate title is The Trustees of St. Joseph's Male Orphan Asylum, and it is the same person as St. Joseph's Catholic Orphan Asylum referred to in the will of said Ethelbert Carroll Morgan, in the city of Washington.

10. This defendant has no knowledge of the matters and things stated in the 10th paragraph of the bill of complaint, and it can, therefore, neither admit nor deny the same.

11. This defendant has no knowledge of the matters and things stated in the 11th paragraph of the bill of complaint, and can, therefore, neither admit nor deny the same.

12. This defendant is advised that it has no interest in the matters and things stated in the 12th paragraph of the bill of complaint, and that it is not necessary for it to make further answer thereto.

13. This defendant makes the same answer to paragraph thirteen of the bill as to the 12th paragraph.

14. This defendant has no concern with the matters and things stated in the 14th paragraph of the bill of complaint, and is advised that it is not necessary for it to make further answer thereto.

15. This defendant makes the same answer to the matters and things stated in the 15th paragraph of the bill.

16. This defendant has no knowledge of the matters and things stated in the 16th paragraph of the bill of complaint, and

44 having no interest therein, is advised that it is not necessary for it to make further answer thereto.

17. Answering the 17th paragraph of the bill of complaint, this defendant states that it is the same person mentioned in the will of said Ethelbert Carroll Morgan as the St. Joseph's Catholic Orphan Asylum in the city of Washington, and this defendant denies each and every of the propositions of law in this paragraph of the bill contained, and says that the legacy to it in said will mentioned is valid and binding.

This defendant says that it has no interest or concern in any of the other matters and things stated in the bill of complaint, and is advised that it is not called upon to make any answer thereto.

And having fully answered said bill of complaint, this defendant prays to be hence dismissed with costs.

THE TRUSTEES OF ST. JOSEPH'S
MALE ORPHAN ASYLUM.
D. J. STAFFORD.

HAMILTON & COLBERT, *Sol'rs.*

I, D. J. Stafford the president of St. Joseph's male orphan asylum, do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief, I believe to be true.

D. J. STAFFORD.

45 Subscribed and sworn to before me this 14th day of September, A. D., 1901.

UPTON H. RIDENOUR, JR.,
[NOTARIAL SEAL.] *Notary Public.*

46 *Answer of the St. Vincent's Orphan Asylum. Filed September* 20, 1901.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, &c., *vs.* JAMES MOSHER ET AL. } Equity. No. 22100, Docket 51.

For answer to the bill of complaint filed in the above-entitled cause, the defendant, The St. Vincent's Orphan Asylum, states as follows:

1. It admits the matters and things stated in the first paragraph of the bill of complaint.

2. It admits the matters and things stated in the second paragraph of the bill of complaint.

3. It admits the matters and things stated in the third paragraph of the bill of complaint.

4. It admits the matters and things stated in the fourth paragraph of the bill of complaint.

5. It admits the matters and things stated in the fifth paragraph of the bill of complaint.

6. It admits the matters and things stated in the sixth paragraph of the bill of complaint.

7. This defendant believes the matters and things stated in the seventh paragraph of the bill of complaint to be true, but for greater certainty refers to the original will of said Ethelbert Carroll Morgan, now on file in the office of the register of wills for the District of Columbia.

47 8. This defendant admits the matters and things stated in the eighth paragraph of the bill of complaint.

9. This defendant says that its corporate title is St. Vincent's Orphan Asylum, and it is the same person as St. Vincent's Catholic Orphan Asylum referred to in the will of said Ethelbert Carroll Morgan, in the city of Washington.

10. This defendant has no knowledge of the matters and things

stated in the tenth paragraph of the bill of complaint, and it can therefore, neither admit nor deny the same.

11. This defendant has no knowledge of the matters and things stated in the eleventh paragraph of the bill of complaint, and can, therefore, neither admit nor deny the same.

12. This defendant is advised that it has no interest in the matters and things stated in the twelfth paragraph of the bill of complaint, and that it is not necessary for it to make further answer thereto.

13. This defendant makes the same answer to paragraph thirteen of the bill as to paragraph twelve.

14. This defendant has no concern with the matters and things stated in the fourteenth paragraph of the bill of complaint, and is advised that it is not necessary for it to make further answer thereto.

15. This defendant makes the same answer to the matters and things stated in the fifteenth paragraph of the bill.

16. This defendant has no knowledge of the matters and
48 things stated in the sixteenth paragraph of the bill of complaint, and having no interest therein is advised that it is not necessary for it to make further answer thereto.

17. Answering the seventeenth paragraph of the bill of complaint this defendant states that it is the same person mentioned in the will of said Ethelbert Carroll Morgan as the St. Vincent's Catholic Orphan Asylum in the city of Washington, and this defendant denies each and every of the propositions of law in this paragraph of the bill contained, and says that the legacy to it in said will mentioned is valid and binding.

This defendant says that it has no interest or concern in any of the other matters and things stated in the bill of complaint, and is advised that it is not called upon to make any answer thereto.

And having fully answered said bill of complaint, this defendant prays to be hence dismissed with costs.

ST. VINCENT'S ORPHAN ASYLUM,
By D. J. STAFFORD, *President.*

HAMILTON & COLBERT, *Solicitors.*

I, D. J. Stafford, the president of St. Vincent's orphan asylum, do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief, I believe
49 to be true.

D. J. STAFFORD.

Subscribed and sworn to before me this 14th day of September, A. D., 1901.

UPTON H. RIDENOUR, JR.,
[NOTARIAL SEAL.] *Notary Public.*

50 *Separate Answer of James Mosher, Substituted Trustee. Filed October 8th, 1901.*

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, &c., *vs.* JAMES MOSHER and MICHAEL J. COLBERT, Substituted Trustees under the Will of Ethelbert Carroll Morgan, *et al.*	In Equity. No. 22100, Docket 50.

The separate answer of James Mosher, one of the substituted trustees under the will of Ethelbert Carroll Morgan, deceased, to the bill of complaint in the above entitled cause.

Said defendant, James Mosher, for answer to the bill of complaint in this cause, answering says: This defendant admits that James E. Morgan, late of the District of Columbia died testate on the 2nd day of June A. D. 1889 seized and possessed at the time of his death both of personal property and real estate some in the State of Maryland but the greater portion thereof in the District of Columbia, and that said James E. Morgan's last will and testament was duly filed and duly admitted to probate and record, in this District.

And this defendant admits that thereafter Ethelbert Carroll Morgan late of the District of Columbia (who was a son of said
51 James E. Morgan) died testate on the 5th day of May A. D. 1891 having at the time of his death both personal property and real estate, and that said Ethelbert Carroll Morgan's last will and testament was duly filed and duly admitted to probate and record in this District; and this defendant admits that Ethelbert Carroll Morgan was a legatee and devisee under his father's said last will and testament.

This defendant admits that said Ethelbert Carroll Morgan in and by his said last will and testament, after making certain special or specific dispositions and bequests, appointed William J. Stephenson and John H. Magruder, trustees for all the rest and residue of his estate, to hold the same on certain uses and trusts in said will specified; and this defendant admits (said Stephenson having died and said Magruder having as trustee resigned) that this defendant and Michael J. Colbert have been duly substituted as, and have duly qualified as, trustees under said last will and testament of said Ethelbert Carroll Morgan deceased in the place and stead of said William J. Stephenson deceased and John H. Magruder who resigned.

This defendant refers to the original last will and testament of said James E Morgan on file in the office of the register of wills for the District of Columbia, and refers to the original last will and testament of said Ethelbert Carroll Morgan on file in said office of the

register of wills for said District, for an accurate statement of the terms and provisions of said respective wills.

This defendant, speaking for himself alone and not for his
52 co-trustee, or any other defendant, says that although this defendant does not object to the legacies, devises, dispositions, terms and provisions of said last will and testament of James E. Morgan, deceased, and of said last will and testament of Ethelbert Carroll Morgan, deceased, or to any of the legacies, devises, dispositions, terms or provisions of said wills or of either of said wills, being carried out, or given effect so far as the same are or is, or may be, legal or valid, or capable of being carried out and given effect at law or in equity; yet this defendant denies that he ever threatened to distribute the estate of said Ethelbert Carroll Morgan deceased, and says that on the contrary he has never expected or intended to distribute the same save and except with and under the direction, protection and control of the court.

And having fully answered, this defendant prays to be hence dismissed with his costs of suit.

JAMES MOSHER.

CONWAY ROBINSON,
Solicitor for James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased.

DISTRICT OF COLUMBIA, *ss:*

I, James Mosher, having been first duly sworn according to law do depose and upon oath say that I have read the foregoing an-
53 swer by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JAMES MOSHER.

Subscribed and sworn to before me this fifth day of October A. D. 1901.

CHARLES M. JONES,
Notary Public, D. C.

[NOTARIAL SEAL.]

54 *Depositions on Behalf of Complainants. Filed September 19th, 1902.*

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend,
vs.
JAMES MOSHER and MICHAEL J. COLBERT, Trustees, *et al.*
} Equity. No. 22100, Docket 50.

WASHINGTON, D. C.,
SATURDAY, *November* 30, 1901—12 o'clock m.

Met pursuant to notice, to take depositions on behalf of the complainants.

Present: Marion Erwin, solicitor for the complainants, and Michael J. Colbert, solicitor for the defendants.

Mr. ERWIN: I now offer in evidence the notice to produce papers and documents, dated October 2, 1901, and request the production, first, of the printed catalogues of Georgetown college for the years 1890, 1891, 1899, 1900 and 1901.

(The above-named notice, offered in evidence by solicitor for the complainants, is attached hereto, marked Exhibit A.)

55 Mr. COLBERT: In response to that notice, we produce the catalogues referred to.

(The above-named catalogues are hereto attached, marked Exhibits B, C, D, E, and F.)

Mr. ERWIN: I now ask the production of the minute books and deeds by and through which the defendants, John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, and Edward I. Devitt, claimed to be the successors of James Rider, Thomas Lilly, Samuel Barber, James Curley and Anthony Rey, who were incorporated by act of Congress of June 10, 1844 "with perpetual succession in deed or in law to all intents and purposes whatsoever by the name and title of The President and Directors of Georgetown College."

Mr. COLBERT: In response to that notice we produce the record book, showing the succession, called for.

(Extracts from the records of the proceedings of the President and Directors of Georgetown College, D. C., are hereto attached, and identified as Exhibit G.)

Mr. ERWIN: I now ask the production of the books and records of said college, showing, for the years 1890, 1891, and now, its "net income" over and above and exclusive of the receipts for the education and support of the students of said college.

Mr. COLBERT: In response to that notice we produce a statement showing the entire resources of the university, exclusive of the

tuition fees received from its students. The entire endowment of Georgetown college is less than $50,000 as shown by said statement, and its net annual income exclusive of tuition fees received
56 from the students, is less than $2500 per annum.

(Mr. Erwin, after examining the papers and documents submitted, admits for the purpose of the case, that the net income over and above and exclusive of the receipts for the tuition and support of students of said college is less than $50,000, and waives the attaching of the documents.)

Mr. ERWIN: I now ask for the charter of the medical department of the university of Georgetown.

Mr. COLBERT: In response to that notice I produce a certified copy of the certificate of incorporation of the Company of the Medical Department of Georgetown University, recorded in Acts of Incorporation No. 4, folio 69 and following pages, of the land records of the District of Columbia; for identification, marked Exhibit H.

I couple with that the statement that the medical department of Georgetown university is now a part and parcel of the corporation known as the President and Directors of Georgetown College, the title to the building occupied by the medical department is now vested in the President and Directors of Georgetown College, and the medical department is controlled and directed by The President and Directors of Georgetown College.

Mr. ERWIN: I now want to say that I object to so much of the response of counsel as states as matter of fact that the Company of the Medical Department of Georgetown College is identified in any legal sense with Georgetown college, and submit that if there is any such identification it would be a matter of record, and should be so proved.

57 Mr. COLBERT: In response to that suggestion: I cede that there is no legal identity between the Compa(Torn)the Medical Department of Georgetown University and (off.)dent and Directors of Georgetown University. All I state is that the medical department is not being operated under this charter now.

Mr. ERWIN: You mean there never has been any organization under that charter?

Mr. COLBERT: There never has been any organization under that charter. The medical department is just as much a part of the university as these buildings here. The title to the building is in the President and Directors of Georgetown College, as the records will show.

Mr. ERWIN: There are no separate directors?

Mr. COLBERT: No. The medical department has a faculty—that is, a corps of professors—but the property and everything of that nature is in the President and Directors of Georgetown College—the title to the building, &c. Father Daugherty, for example, president of the university, is president of the medical faculty, *ex officio*.

Mr. ERWIN: Not elected separately?

Mr. COLBERT: No. He is the president, *ex officio*. The law de-

partment, for example, has no legal existence at all; neither has the medical department; neither has the dental department; neither has the academical department, nor the preparatory school.

Mr. ERWIN: You mean to state then that there has been no organization under this charter?

58 Mr. COLBERT: There has been no organization, and no user, under this charter. I do not know who got this up.

(Father Jerome Daugherty, president of Georgetown college, was here requested to give such information as might be in his possession concerning the matters under consideration.)

Father DAUGHERTY: That was for the purpose of holding that building. We did not want to pay for it at the time, because of our poverty. These men got together, and held this building, because we were too poor, at the time, to buy. They held the building. We gave the degree, and had the providing of the professors, but we did not hold the building—we were too poor.

Mr. COLBERT: Was not that about the time this building was erected?

Father DAUGHERTY: Yes. When we got a little more on our feet we took that property over, which they held, and they ceased to exist as a corporation. They simply held it for us because we were too poor at the time to buy.

Mr. COLBERT: And there was a conveyance of that property on H street to this corporation.

Father DAUGHERTY: Yes.

Mr. ERWIN: To the company?

Mr. COLBERT: To the corporation. And afterwards, within a very short time—I think within probably three or four years—there was a re-conveyance of the property to Georgetown college.

Father DAUGHERTY: We were too poor to pay that amount.

59 I think it was $20,000.

Mr. COLBERT: Where is that property? I forget the number on H street.

Father DAUGHERTY: No. 920 H street, northwest. You can get the title very readily by referring to the record of the conveyance.

Mr. ERWIN: I will ask, is it not true that the organization of Georgetown college has been under the control of the Society of Jesus since its organization?

Father DAUGHERTY: Yes.

Mr. ERWIN: That is a fact?

Father DAUGHERTY: I think Georgetown college has been under the control of Jesuits since the charter—not always previous to that; probably since 1845. At the beginning, of course, we were not; but I suppose you are not going further back than the charter. Under that charter it was Jesuit, and has been Jesuit ever since. Its board of corporation, the President and the Directors of Georgetown College have always been Jesuits.

Mr. COLBERT: Since 1845.

Father DAUGHERTY: Yes, since the charter. Previous to 1814 we were not. You understand there were no Jesuits, legally, before

that in this country. The college began, as an academy, in 1791. There were no Jesuits, legally, until 1814.

Mr. ERWIN: The statements contained in your catalogues, which are in evidence here, are correct and true as to the relations?

60 Father DAUGHERTY: Yes, exactly. You will see there exactly how it is.

At the request of counsel for the complainants, Father Daugherty explained that the letters "S. J." appearing after certain of the names in the minutes of the proceedings of the President and Board of Directors of Georgetown College, mean "*Societatis Jesu*," or the Society of Jesus.

The further hearing of these depositions was thereupon adjourned until further notice.

This is to certify that I have read over the foregoing pages numbered one to seven inclusive, and particularly the statements therein contained purported to have been made by me, and I do solemnly swear that said statements as corrected are true to the best of my knowledge and belief.

JEROME DAUGHERTY, *S. J.*

Subscribed and sworn to before me this — day of December 1901.

JOHN J. HAMILTON,
Examiner in Chancery.

61 In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend, *vs.* JAMES MOSHER and MICHAEL J. COLBERT, Trustees, *et al.*	Equity. No. 22100, Docket 50.

WASHINGTON, D. C.,
SATURDAY, *January 25th*, 1902—3:30 o'clock p. m.

Met pursuant to notice, to take depositions on behalf of the complainants.

Present: Marion Erwin, solicitor for the complainants, and Michael J. Colbert, solicitor for the defendants.

Father JEROME DAUGHERTY, president of Georgetown college, recalled by Mr. Erwin, solicitor for complainants.

Examined by Mr. ERWIN:

Q. Fatherty Daugherty, these catalogues that were produced by you at the former hearing, Exhibits B. C. D. E. and F., catalogues

of Georgetown college, correctly state at the times they were issued, what was taught in the college, do they not?

A. Yes.

Q. And the statements in them refer to the history of the college, and are entirely correct, are they?

62 A. Oh, yes, I think you will find them very much the same, they are correct.

Q. On page 15, I see this stated under the head of studies, "The course of study at Georgetown is that generally pursued in colleges of the Society of Jesus"—page 15, of the catalogues of 1889–90.

A. That is substantially correct.

Q. On page 18, of the same catalogue, under the head of "Religious instruction," I read this, "Religious instruction is considered of the first importance in education. Catechism forms one of the regular class recitations, and weekly catechetical lectures are attended by all. The prize for Christian doctrine is awarded to the author of the best paper upon the matter of these lectures. Further instruction is given to such as have need of it, or are preparing for the sacraments. For the development of piety there are two sodalities, which meet weekly. All Catholic students are expected to approach the sacraments, at least, once a month." That correctly sets out the procedure of the college, does it?

A. Yes, but I may take the matter up a little more fully. If any non-Catholic were to object, he would not be compelled to take the catechism in class, that is, he is not obliged to. I may say that not infrequently some boy, who is not a Catholic has won the prize in catechism. There is no obligation—strict obligation—it is simply as a class matter, that's all.

Q. On pages 22 and 23, of the same catalogue, under the head of "Course of study for the degree of bachelor of arts," the

63 general studies are set out from languages, mathematics, science, modern languages and ethics, and under the separate head of English, I see this, "Doctrinal exposition of religion, church history—lectures based on Noethen. I will ask you whether or not, that book is the text book, Noethen, on which the lectures are based?

A. I cannot tell you whether that is the book now.

Q. At that time?

A. It was at that time.

Q. In '89?

A. Yes.

Q. Look at this book, which I now hand you from the press of John Murphy Company, "A history of the Catholic Church, Noethen," that is the text book?

A. That was the hand book at that time.

Q. That text book was taught in the college?

A. That forms the basis. We have other text books just like a lawyer will have a library full of books, but one upon which the lectures are based.

Q. This book fairly represents the teachings, does it not?
A. Yes, sir, we adopt that book.

Mr. ERWIN: I desire to offer this book in evidence, and will ask the examiner to mark it Exhibit "J."

Q. On page 26, of the same catalogue, under the head of "Preparatory department," and under the subhead of "English," is put down the book, "De Harbe's Full Cathechism," is that the catechism taught?

A. That's the catechism, and considered one of the best.

64 Q. Look at this book, which I now hand you entitled, "Catechism of the Catholic Religion," De Harbe, that's the book, is it?

A. That's the book. We consider it one of the best.

Solicitor for complainant offers the book in evidence and asks that it be marked Exhibit "K."

Q. On page 28, of the same catalogue, under the head of "General regulations," I read this: "No distinction is made in the reception of students on the ground of religious belief, but all the boarders are required to be present at the public exercises of religion."

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. It is the public exercises such as are held in your chapel?

A. Such as are held in chapel, which calls them all together for general good, and this we do merely as a matter of discipline. They are not obliged to attend the services; not compelled to take part, only merely to be present at those services, and that as a matter of discipline.

Q. And that is the exercises of the Catholic church?

A. Yes, sir.

Q. Under the head of "Academic costumes," in the catalogue of 1901, page 40, a description of the costumes worn by the

65 students is set out, and as a sub-head is stated, for the students of theology, scarlet, I believe.

A. No; that refers only to the degree. The costumes are the caps and gowns, and hoods something like the Supreme Court judges' robe, hood &c., and according to that hood, the degree of the wearer is indicated. There is a regular cap and gown, and when a boy gets his degree as bachelor of arts, or when a man takes an LL. D., or a D. D., or M. D., he is supposed to wear one of these gowns, and to the gown is attached what we call a hood, and that hood is lined with a certain color, and that color distinguished the faculty to which he belongs, whether law, medicine or theology.

Q. There is a course especially for theology in Georgetown, is there not?

A. Not at present; there was, but they moved that away in '69. That now has its own charter, it is looked upon as a portion of Georgetown, but has its own charter, and has been removed to

Woodstock, Md. That has nothing to do with Georgetown's claim to give the different degrees. Georgetown claims the right to confer these, to confer honorary degrees in theology; that is what that clause refers to.

Q. In catalogue, Exhibit "F," 1900, and 1901, under the head of studies, on page 45, I read, "Every student must select, at least, three courses involving attendance upon lectures for eight hours a week; one of these classes must be rational philosophy," that's correct, is it?

66 A. That is for the post-graduate work. If a man has taken his degree as bachelor of arts, then we give him, (if he chooses to remain in college), we give him further teaching, which is called post graduate work.

Q. Then that is true, this statement that I just read in regard to that, that every student must select, at least, three courses involving attendance upon lectures for eight hours a week, and one of these courses must be rational philosophy?

A. Yes.

Q. Under the head of philosophy on page 69, of the catalogue, I see entered, "psychology, natural theology, ethics, special ethics, &c.," does that all come under the general head of rational philosophy?

A. Those are the different parts of it; of course we make a distinction between ethics, which refers to morality and special metaphysics, which refers to mental activity, one kind or another.

Q. Under the head of natural theology, is that the general discussion of the principles of natural science on religion?

A. No; it is—natural theology with us means what a man can learn of God by his own natural intellect, of the nature of God.

Q. Under the same head of philosophy, on pages 69 and 70, under the head of special ethics, I see the various discussions outlined there in the lectures, "power and rights of the State, school question, Church and State, liberty of the press &c.," would that

67 come under the head of natural theology?

A. No; some of them, we can treat from a strictly natural point of view, and others in regard to the relation between Church and State would necessarily present the idea of the supernatural, because we look on the Church as of supernatural origin, that it was instituted by God in a supernatural way, and is kept in existence by a supernatural pow-.

Q. On page 76, of the catalogue, Exhibit "F," under the head of "Christian doctrine" for the freshman, sophomore, junior and senior years, I see it stated that the text book is the Hand Book of Christian Religion, by Wilmers, S. J., author.

A. The book that we have mentioned there is the translation of the book published in Germany.

Q, Look at this book, which I now hand you, entitled, "Hand Book of the Christian Religion," Wilmers, S. J. and state whether that is the book?

A. That's the book taught in the upper classes of the college.—

the university classes, as it is more scientific in its character, not of a catechetical form, but the regular theological form.

Mr. ERWIN: I will ask to have this book marked Exhibit "L," and offered in evidence.

Q. This book fairly represents the teachings of the college on the subject of religion, does it?

A. Yes, it is a fine book.

Q. On page 92 of the same catalogue, I see it stated that from 1817 to 1900 there were twenty-seven degrees of D. D. conferred by the college.

A. Yes. I think that may be regarded as accurate for that
68 period of time, as stated in the history of the college; of course, I can only vouch for it to that extent; personally, I cannot tell you, but I can vouch for the fact.

Q. On page 92, of the catalogue marked Exhibit "E," I mean.

A. Yes, yes, yes.

Q. Referring, now, to the History of the Catholic Church, by Noethen, which has been offered in evidence, on page 427, of the book, under date of 1541, relating to the conversion of the Indies, and giving an account of the work of Francis Xavier, I see this stated, "He studied in Paris, where he taught philosophy in the university; it was there that he formed an attachment for Ignatius Loyola, founder of the Society of Jesus, and he became one of his first di-ciples." The Society of Jesus to which reference has been made in these catalogues, and which controls Georgetown college, is the society founded by Ignatius Loyola, is it not?

A. Yes, sir.

Q. On page 501, of this History of the Catholic Church by Noethen, which is in evidence, under the date of A. D., 1773, I read this: "The suppression of the Jesuits was the commencement of a long train of disastrous events, which for many years filled the pages of history; and philosophy, having deprived the church of zealous defenders, seemed ready to prepare herself for great conquests, and therefore, reposed on the ruins she had made. The Jesuits
69 who were appointed by the government to teach and defend religion, combated with an energy and success worthy of all praise, against heresy and infidelity, &c." I will ask you, Father Daugherty, whether or not in that is not stated the mission of the Jesuits, that is to say, to teach and defend religion?

A. To teach and defend religion, yes, sir.

Q. That's the sole object of the society?

A. Certainly. The only object of the society is to get a little religion into men.

Mr. ERWIN: I desire to introduce and now offer in evidence the several exhibits from "A" to "L," inclusive, numbered by the examiner, and also the papers produced by the two orphan asylums, Exhibits M, N, O, P, Q, R and S, and particularly the catalogues of Georgetown college, and the works identified, Handbook of the Christian Religion, De Harbe's Catachism, and Noethen's Church History.

Cross-examination.

By Mr. COLBERT:

Q. Is the Society of Jesus a corporation?

A. No; the Society of Jesus, as a society is not a corporation.

Q. Is the Society of Jesus, and the President and Directors of Georgetown College two different institutions?

A. They are two different institutions in this sense. That the society, a certain portion of them get together, and form this corporation. Every house in the society is independent of every
70 other house. They are like the government of two States. They have a certain number of laws which are in common, but they have other laws, which are special to each.

Q. The President and Directors of Georgetown college is a corporation created by act of Congress, and having a separate, independent constitution?

A. Yes.

Q. Is it not a fact that the Columbian University of Washington, D. C., was organized, and is controlled by the Baptist church?

A. Yes, sir.

Mr. ERWIN: I desire to object to that question and answer, because it is not shown as to the way in which the knowledge of the witness is obtained, and also because it is a matter that would have to be proven by recorded evidence.

Q. You are the president of Georgetown university?

A. I am, sir.

Q. You know as much about these affairs as any body?

A. Yes.

Q. Is it not a fact that the university of Princeton is controlled by the Presbyterians?

Mr. ERWIN: I desire to note the same objection.

A. It is a notorious fact, as the fact that Georgetown is controlled by the Jesuits. Both those colleges are older—not Columbia, but Princeton is much older than Georgetown college.

Q. How about Harvard and Yale; they have no religious
71 affiliations or control?

A. Not at present. We have now in Georgetown college Father Welch, who was one of the oldest graduates of Harvard, Father Buel, of Yale in '81.

Q. You have told us what the object and aim of the Society of Jesus was? I believe your motto is, "*Ad Majorem Dei Gloriam.*"

A. Yes.

Q. What is the object and aim of Georgetown college?

A. The object and aim of Georgetown college, as of all other colleges, is to teach men a certain amount of human knowledge, and also, when we have the opportunity, of conveying the views we hold, and by our di-cipline and example to urge them on in their spiritual life. In other words to save their souls.

Q. Is it not a fact that the principle object of Georgetown college is to teach human knowledge?

A. Certainly.

Q. You have in your college a certain amount of religious training?

A. I was thinking how much time is spent in what is called, "Strictly doctrinal teaching."

Q. How much time do you spend?

A. About ten minutes a day for six days in the week, probably not that much. Besides there is an additional thirty minutes given once a week to catechetical lectures, if you remember, given one day in the week.

Q. To strict religious training you devote a very small fraction of the time at the college?

72 A. Yes, certainly.

Q. Do you teach theology at the school?

A. No.

Q. Do you make any distinction between Catholic and non-Catholic students?

A. When we have any one of that kind in the college, as I said a moment ago, who does not want any religious teaching, he is not compelled to by any of our rules, but a certain amount of religious training he will get, it is simply in the atmosphere in which he lives.

Q. You have a law department connected with your college?

A. We have.

Q. There is nothing Catholic about that?

A. No; we do not teach Catholicism any more than any other college, except that our professors are many of them Catholics, and some are not, but where it comes to a question where we need Catholic doctrine to explain the law properly, the law will be explained properly.

Q. You have a great many professors in your school who are not Catholics?

A. Certainly; our professor of physics in the college is not a Catholic.

Q. You have a medical department connected with Georgetown college, and there is nothing Catholic about that, is there?

A. No; the only reason that we have those is as I say there are certain subjects, you know, in law, where we want things given properly, and so there are certain things in medicine that we

73 want explained properly, and for that reason we have these departments of law and medicine, not for any particular doctrine, but just to keep out bad theories, both in law and medicine.

Q. Have you any theological department connected with Georgetown college?

A. Not strictly speaking.

Q. Has Georgetown college any theological department?

A. It has not.

Q. Do you make any distinction in receiving students into any department of the college, between Catholics and non-Catholics?

A. None whatever.

Q. Can you tell me relatively, what is the proportion of non-Catholics to the number of students to-day?

A. I have no idea.

Q. Small or not?

A. Small. I cannot tell you exactly how many.

Q. Quite a number are there not?

A. I would not say that. I am not prepared to say that there are more than eight or ten Protestant boys in the college. That would include Jews.

Re-direct examination.

By Mr. ERWIN:

Q. Father Daugherty, referring to your testimony on the first hearing, on page 6, where you made certain corrections relative to the answer to a question as to whether or not the President
74 and Directors of Georgetown College had not always been Jesuits, you stated this: "Yes, since the charter; previous to 1814, we were not, you understand there were no Jesuits legally in this country. The college began as an academy in 1789. There were no Jesuits legally until 1814." I will ask you what you mean by the expression—legally?

A. The society was suppressed, as you read in Noethen's History just a few moments ago, in 1773, by brief of the Pope, Clement 14." There were certain formalities to be complied with in order that that brief should be executed. The brief was sent away to the different countries, but it was not allowed to enter into Russia. The Jesuits in Russia never got that brief, and that is the reason that I put it "legally," because there is a question in the society whether the society was actually ever suppressed altogether. We were suppressed until 1814, but that was in this country; the question was whether we were ever really suppressed, that is, entirely suppressed, because the formulas were not entirely carried out. I used the word "legally" in reference to canon law, and it does not refer to our law in this country.

Q. The Society of Jesus then, is a religious society of the Catholic church taking its final directions on any subject from the Pope? Is that correct?

A. It is a religious order—the Society of Jesus is a religious order founded by Saint Ignatius, and like all orders approved and directed by the Pope, and we take special vows to obey the
75 Pope especially in certain missions, we are bound to obey him, when directed by him. Of course, he doesn't send us on these missions often, but sometimes he does send a man on a special mission. I have known one man in this country, who was called over by special order of the Pope to go to Rome to teach.

Mr. Colbert for the defendants in response to the call of Mr. Erwin for the By-Laws of Saint Vincent's Orphans' Asylum and Saint

Josephs' Orphans' Asylum, states that he called upon the Reverend Dr. Stafford, the president of those two institutions, and Father Stafford states that he has been unable to find any by-laws for these two corporations, and that his information is that there are no such by-laws in existence, but that if he should find them, he will produce them at the hearing.

Mr. ERWIN: Father Daugherty, these two asylums are under the auspices of the Catholic church, are they not?

A. They are.

Q. The children in those asylums are taught the religion of the Catholic church?

A. I cannot answer. I do not know that, I cannot answer.

Mr. COLBERT: When you say that those two institutions are under the auspices of the Catholic church, do you mean to say that the persons in control are persons belonging to the Catholic church?

A. That's what I mean. Simply the control.

Q. They are both corporations?

76 A. Yes, sir.

Q. Do they make a distinction in those two institutions in receiving helpless people between Catholic and Protestants?

A. I don't think so far as my experience goes that there is one institution which has ever excluded anybody on account of religion. There is no institution of that kind, which has ever made any distinction so far as I know, in the receiving of children.

Q. Do you know anything about whether they teach the catechism to these children in these two institutions?

A. No; I suppose that if there are Protestant children there, their religion is safe guarded, and other religions are more safeguarded there than the religion of Catholics in Protestant institutions, and right here in this town.

The further hearing of these depositions was thereupon adjourned until further notice.

This is to certify that I have read the foregoing pages numbered from one to fifteen, inclusive, and I do solemnly swear that the statements therein contained are true, to the best of my knowledge and belief.

JEROME DAUGHERTY, *S. J.*

Subscribed and sworn to before me this 26th day of February, 1902.

JOHN J. HAMILTON,
Examiner in Chancery.

77 ELEANORA D. SPEER } Equity. No. 22100.
vs.
JAMES MOSHER ET AL. }

I, John J. Hamilton, an examiner in chancery in and for the District of Columbia, do hereby certify that the foregoing and annexed

depositions of Jerome Daugherty were taken down in shorthand in my presence at the time and place set forth in said depositions from the oral statements of the witness then and there produced before me, said witness having been by me first duly sworn to tell the truth, the whole truth and nothing but the truth touching the matters at issue in said cause. That thereafter the said depositions were reduced to typewriting under my personal supervision, were read over to the witness and by him subscribed in my presence.

I further certify that the proceedings before me hereto attached and the exhibits thereto, as well *as* those copied therein, as those thereto attached are correctly and truly set forth by me, and said exhibits were produced as evidence as therein set forth; and that exhibits marked J, K, and L. for identification, filed herewith and referred to in said proceedings are the books offered in evidence as set forth in said proceedings.

I further certify that I am not of counsel in said cause or otherwise interested therein, and I return said depositions to the court for such action as to the court may seem proper.

JOHN J. HAMILTON, *Examiner.*

78 EXHIBIT M. Filed September 19, 1902.

In response to the notice to produce, the St. Vincent's Orphan Asylum produces its charter from the 6th Statutes at Large, page 453, as follows:

"An act to incorporate Saint Vincent's orphan asylum, in the District of Columbia.

Be it enacted, &c., That William Matthews, Matthew Deagle, Peter S. Shreiber, Thomas Carberry and William Hickey, and their successors in office are hereby made, declared, and constituted a corporation and body politic, in law and in fact, to have continuance forever, under the name style and title of Saint Vincent's Orphan Asylum.

SEC. 2. And be it further enacted, That all and singular the lands, tenements, rents, legacies, annuities, rights, privileges, goods, and chattels, that may hereafter be given, granted, sold, devised or bequeathed to Saint Vincent's orphan asylum, be and they are hereby, vested in, and confirmed to, the said corporation; and that they may purchase, take, receive, and enjoy any lands, tenements, rents, annuities, rights, or privileges, or any goods, chattels, or other effects of what kind or nature soever, which shall, or may hereafter be given, granted, sold, bequeathed, or devised unto them or either of them, as trustees of the said asylum, by any person or persons, bodies politic or corporate, capable of making such grant, and to dispose of the same: Provided, the clear annual income of property to be acquired by said corporation shall, at no time, exceed the sum of five thousand dollars.

79 SEC. 3. And be it further enacted, That the said corporation, by the name and style aforesaid, be, and shall be hereafter, capable, in law and equity, to sue and be sued, to plead and be impleaded, within the District of Columbia and elsewhere, in as effectual a manner as other persons or corporations can sue or be sued; and that they shall adopt and use a common seal, and the same to use, alter, or exchange at pleasure; that they may appoint such officers as they shall deem necessary and proper, to assign them their duties, and regulate their compensation, and to remove any or all of them, and appoint others, as often as they shall think fit; and the said corporation shall make such by-laws as may be useful for the government and support, and for the general accomplishment of the objects of the said asylum, as hereinafter mentioned, and not inconsistent with the laws of the United States, or the laws in force in the District of Columbia, for the time being, and the same to alter, amend, or abrogate at pleasure.

SEC. 4. And be it further enacted, That there shall be a meeting of the regular annual contributors to the support of Saint Vincent's orphan asylum, in the month of June, in each year, the hour and day and manner of giving notice for which, to be regulated by the by-laws; at which meeting, by those who from the by-laws may be qualified to vote, nine female managers shall be elected, who shall appoint a first and second directoress, and may fill vacancies in their own board until the next annual election; that their duties shall be regulated by the by-laws; and the present managers may continue in office until the election in June next.

80 SEC. 5. And be it further enacted, That with the consent and approbation of the parent, guardian, or friends, who may have the care of any male or female child, or where a child may be destitute of any friend or protector, the same may be received into Saint Vincent's orphan asylum, under such regulations as may be made by the by-laws, and there protected, instructed, and supported; and they shall not thereafter be withdrawn, or be at liberty themselves to withdraw from the asylum, without the consent or dismissal of the corporation aforesaid, until, if a male, he shall have attained the age of twenty-one years, or, if a female, the age of eighteen years; but, up to the ages aforesaid respectively, they shall remain subject to the direction of the said corporation, unless they may, by the same, be exonerated from service previous to attaining those ages respectively; and the said corporation shall have the power to bind any child under their care, for the purpose of acquiring a knowledge of some useful trade, occupation or profession, under such conditions as may be determined by the by-laws, a copy of which conditions shall be delivered to, and they shall be binding on every person to whom any child may be so bound; that there may also be established, in connection with Saint Vincent's orphan asylum, schools for the daily attendance of children whose parents or guardians are or may be unable to pay for their instruction, or whose parents or guardians may contribute toward the support of the asylum, under such regulations as may be made in the by-laws.

SEC. 6. And be it further enacted, That any vacancy, which, from death, resignation, or otherwise, may happen in the board of trustees, shall be filled according to the mode to be prescribed in
81 the by-laws; they may hold such meetings as they shall think proper, and, to give form to their proceedings, may appoint such officers as they may deem necessary, and provide proper checks and responsibilities for the security of the property and funds of the corporation aforesaid; that *that* they shall keep a journal of their proceedings, upon which the by-laws shall be recorded; and that they shall make a report, at the annual meeting to be held in June, of the affairs and conditions of the institution for the preceding year.

SEC. 7. And be it further enacted, That it may be lawful for Congress hereafter to alter, amend, modify, or repeal the foregoing act.

Approved, February 25, 1831.

EXHIBIT "N." Filed September 19, 1902.

In response to the notice to produce, the St. Joseph's Male Orphan Asylum produces its charter from the 10th Statutes at Large, page 846, as follows:

(EXHIBIT "N.")

An act to incorporate St. Joseph's male orphan asylum, in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Thomas Carbery, James S. Harvey, Thomas Feran, Gregory Ennis, Nicholas Callan, Hugh B. Sweeney, John Carroll Brent, Richard H. Clark, and William H. Ward, and their successors, be and they are hereby made a body politic and corporate forever, by the name of the Trustees of St. Joseph's Male Orphan Asylum, for purposes of charity and education, and by that name may sue and be sued, prosecute and defend; may have and use a common seal, and the same
82 alter and renew at pleasure; may adopt and establish rules, regulations, and by-laws, not repugnant to the Constitution and laws of the United States, for properly conducting the affairs of said corporation may take, receive, purchase, and hold estate, real, personal, and mixed, not exceeding in value one hundred thousand dollars at any one time, and may manage and dispose of the same at pleasure, and apply the same, or the proceeds of the sales thereof, to the uses and purposes of the said corporation, according to the rules and regulations which now are or may hereafter be established.

SEC. 2. And be it further enacted, That Congress may at any time hereafter, alter, amend, or repeal the foregoing act.

SEC. 3. And be it further enacted, That nothing in this act shall

be so construed as to authorize the said corporation to issue any note, token, device, scrip, or other evidence of debt, to be used as a currency.

SEC. 4. And be it further enacted, That each of the trustees in the said corporation shall be held liable in his or her individual capacity for all the debts and liabilities of the said company, however contracted or incurred, to be recovered by suit, as other debts or liabilities, before any court of competent jurisdiction.

Approved February 6, 1855."

EXHIBIT "O." Filed September 19, 1902.

Also, in response to notice to produce, the said St. Joseph's Male Orphan Asylum produces the following documents:

83 (EXHIBIT "O.")

"Messrs. Clarke and Ward on the part of the Young Catholic Friends Society having consulted me as to the expediency of obtaining a charter for a male orphan asylum to be erected at Washington, I approve of the measure, as likely to be beneficial to the interests of religion.

FRANCIS PATRICK KENRICK,
Archbp. Balt.

Balt., Sept. 26, 1854."

(EXHIBIT "P." Filed September 19, 1902.)

"WASHINGTON, *Jan. 3rd*, 1855.

Hon. James Shields, U. S. Senator.

SIR: We have seen the bill to incorporate St. Joseph's male orphan asylum in the District of Columbia, now pending in Congress, and, approving of the same, recommend it to your favor, that it may be passed.

We have the honor to be very respectfully your ob't s'v'ts,

S. A. CLARKSON,
Assistant Pastor of St. Dominick's.
MATHIAS ALIG,
Pastor of St. Mary's Church.
H. J. DENECKERE,
S. J. Presid't Washington Seminary.
JNO. B. BYRNE,
Ass't Pastor of St. Mathew's.
TIMOTHY JOS. O'TOOLE,
Pastor of St. Patrick's.
F. E. BOYLE,
Assistant at St. Patrick's."

84 Filed September 19, 1902.

(EXHIBIT "Q.")

WASHINGTON, *January* 4, 1855.

I hereby certify that by virtue of a resolution passed by the Young Catholic's Friend Society of this city, and agreeable to the recommendation of the Most Rev'd Archbishop of Baltimore, I appointed the eight gentlemen mentioned in the bill, with myself, now before the Senate, for incorporating St. Joseph's male orphan asylum.

JOHN CARROLL BRENT,
President of the Young Catholic's Friend Society.

{ Seal of St. Joseph's Male Orphan Asylum, D. C., Incorporated Feb. 6, 1855. Act of Congress." }

EXHIBIT "R." Filed September 19, 1902.

WASHINGTON, *December* 29, 1855.

"GENTLEMEN: Deeming it the proper time to carry out the understanding upon which the board of trustees of St. Joseph's male orphan asylum was formed, that one or more of the members should retire so as to give place to such of the reverend clergy of the city as might be proposed to take part in the management, I respectfully tender my resignation as one of said trustees.

In withdrawing from the board I feel satisfied that my fellow members will appreciate my motives which are agreeable to the original understanding I have mentioned, and arise from a
85 conviction that the change will be for the permanent benefit of the charitable object to which the trustees are devoted.

I shall, however, though not officially associated with you, still feel the most active interest in the acts & success of the board, & hold myself ever ready to aid the holy cause, in any way my service may be required.

I remain, very respectfully yours,

JOHN CARROLL BRENT.

To the board of trustees of the St. Joseph's male orphan asylum."

EXHIBIT "S." Filed September 19th, 1902.

(EXHIBIT "S.")

"THURSDAY, *August 28th*, 1856.

Meeting called by the president. Present Rev. Mr. O'Toole, Mr. Feran, Mr. Harvey, Mr. Ennis and Mr. Clarke. Mr. Ward the secretary being absent Mr. Clarke was appointed secretary *pro tem.* Mr. O'Toole reported the terms upon which the Sisters of the Holy Cross

would be willing to take charge of the asylum and school, which were accepted as set forth in the following agreement, which was reduced to writing, signed and forwarded to the sisters, viz: (agreement on other side) On motion Rev. Mr. O'Toole was requested to cause suitable announcements of the opening of the asylum and school on next Sunday in all the churches and adopt measures for having the house furnished. He was also authorized to hire a servant woman for the asylum. Advertisements were ordered
86 to be inserted in the city papers, when the board adjourned

MONDAY, *Sept.* 1*st*, 1856.

Regular meeting.

Present: Rev. Messrs. O'Toole & Byrne and Messrs. Harvey and Clarke. No quorum.

(Endorsed:) Copy. Trustees of St. Joseph's Male Orphan Asylum and Sisters of the Holy Cross.

(The following is a copy of the "agreement on other side" referred to above:)

"Copy.

Memorandum of an agreement made and entered into this 29th day of August A. D. 1856 by and between the "Trustees of St. Joseph's Male Orphan Asylum" in the District of Columbia, by their president, the Rev. Timothy J. O'Toole, of the one part, and the "Sisters of the Holy Cross" of the other part, witnesseth that, in accordance with a resolution passed by the said trustees in meeting on the 28th of August, 1856, the said trustees agree to place St. Joseph's male orphan asylum under the care and direction of said sisters, together with the school attached thereto; that the sisters (three in number) shall receive sixty dollars per annum each, payable quarterly in advance, also their travelling expenses to Washington, and for the first year the receipts from the school; the said trustees reserving the right to elect for the subsequent years between a continuance of the said rate of compensation, and a substitution therefor of one hundred dollars to each sister pay-
87 able quarterly in advance; reserving the receipts from the school for themselves; that the said asylum and school shall be furnished by the said trustees as required by the said sisters, and the number of the sisters may be increased from time to time as may be hereafter agreed upon.

In testimony whereof the said parties have hereto set their hands and seals the day and year aforesaid.

—— ——, [SEAL.]
Pres't of the Board of Trustees.
—— ——. [SEAL.]

Attest: RICHARD H. CLARKE,
Sec. pro Tem."

It is stipulated between counsel for the complainant and M. J. Colbert, of counsel for the parties represented by him, as appears of record, that Ethelbert Carroll Morgan departed this life on the date stated in complainant's bill. Also, that the copy of the last will and testament of the said Ethelbert Carroll Morgan attached to the bill, is a true copy of the original will, duly admitted to probate in the District of Columbia. This stipulation is subject to correction of any clerical error, should it be discovered during the progress of the case that said copy in any way departs from the original will as probated.

It is further stipulated that these proceedings and the originals and copies of papers, with the exhibits hereto attached,
88 proved before John J. Hamilton, one of the examiners in chancery for the supreme court of the District of Columbia, shall be certified by him as evidence regularly taken in the case.

M. J. COLBERT,
Solicitor for Defendants, as Named of Record.
MARION ERWIN,
Solicitor for Complainants, as Named of Record.

Washington, D. C., September 9th, A. D. 1902.

I hereby acknowledge receipt of due notice of the taking of all the evidence in this cause, and hereby so stipulate; and I further hereby unite in the above stipulation.

CONWAY ROBINSON,
Solicitor for the Defendant, James Mosher, Substituted Trustee.

89 EXHIBIT "A." Filed September 19, 1902.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, ETC., *vs.* JAMES MOSHER, Trustee, ET AL. } In Equity. No. 2210, Doc. 50.

To Messrs. Hamilton & Colbert, solicitors of record in the above stated cause:

The defendants, John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, and Edward I. Devitt, who answer that they are "the President and Directors of Georgetown College" are given notice hereby to produce at each and every hearing before the master and before the court in the above stated cause the following described books documents and papers, to be used as evidence on part of complainant:

(1.) Printed catalogue of the above stated college for years 1890, 1891, 1899, 1900, 1901.

(2.) The minute books and deeds by and through which the defendants John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker and Edward I. Devitt claim to be the successors of James Rider, Thomas Lilly, Samuel Barber, James Curley and Anthony Rey who were incorporated by act of Congress of June 10, 1844, "with perpetual succession in deed or in law to all intents and purposes whatsoever by the name and title of the Presi-
90 dent and Directors of Georgetown College." The records and documents called for herein, to include each succession beginning with the above named original incorporators.

(3.) The books and records of said college showing for years 1890–1891 and now its "net income" over and above and exclusive of the receipts for the education and support of the students of said college."

(4.) The charter of the "Medical department of the University of Georgetown," or copy thereof.

Respectfully,

MARION ERWIN,
Solicitor for Complainant.

Oct. 2, 1901.

91 EXHIBIT "G." Filed September 19, 1902.

Record of the Proceedings of Georgetown College, Incorporated June 10, 1844.

GEORGETOWN COLLEGE, D. C., *June* 11, 1844.

The Rev. James Ryder, S. J., Rev. Thomas Lilly, S. J., Rev. Samuel Barber, S. J., Rev. James Curley, S. J., and Rev. Anthony Rey, S. J., the incorporators named in the act of Congress entitled "An act to incorporate Georgetown college in the District of Columbia, approved June 10, 1844," assembled at Georgetown college on the 11th day of June, A. D. 1844, and accepted the said act of Congress as the charter of said college, which act is in the following words:

"28th Congress of the United States, at the first session, begun and held at the city of Washington on Monday the 4th day of December, 1843.

An act to incorporate Georgetown college in the District of Columbia.

Be it enacted, &c., That there be erected, and hereby is erected, in Georgetown, in the District of Columbia, a college for the instruction of youth in the liberal arts and sciences, the name, style, and title of which shall be "The President and Directors of Georgetown College."

SEC. 2. And be it further enacted, That James Ryder, Thomas Lilly, Samuel Barber, James Curley, and Anthony Rey, be, and they are hereby declared to be, a body politic and corporate, with per-

petual succession in deed or in law, to all intents and purposes whatsoever, by the name, style, and title of "The President
92 and Directors of Georgetown College," by which name and title they and their successors shall be competent, at law and in equity, to take to themselves and their successors, for the use of said college, any estate whatsoever, in any messuage, lands, tenements, hereditaments, goods, chattels, moneys, and other effects, by gift, bequest, devise, grant, donation, bargain, sale, conveyance, assurance, or will; and the same to grant, bargain, sell, transfer, assign, convey assure, demise, declare to use and farm let, and to place out on interest for the use of said college, in such manner as to them, or a majority of them, shall be deemed most beneficial to said institution; and to receive the same, their rents, issues, and profits, income and interest, and to apply the same for the proper use and benefit of the said college; and by the same name to sue and be sued, to implead and be impleaded, in any courts of law and equity, in all manner of suits, actions, and proceedings whatsoever, and generally, by and in the same name, to do and transact all and every the business touching or concerning the premises: Provided, that the same do not exceed the value of fifty thousand dollars nett annual income, over and above and exclusive of the receipts for the education and support of the students of said college.

SEC. 3. And be it further enacted, That the said corporation shall adopt a common seal, under and by which all deeds, diplomas, and acts of the said college or corporation, shall pass and be authenticated, and the same seal at their pleasure to break and alter, or devise a new one.

SEC. 4. And be it further enacted, That no misnomer of
93 the said corporation shall defeat or annul any donation, gift, grant, devise, or bequest, to or from the said corporation.

SEC. 5. And be it further enacted, That the said corporation shall not employ its funds or income, or any part thereof, in banking operations, or for any purpose or object other than those expressed in the first section of this act; and that nothing in this act contained shall be so construed as to prevent Congress from altering, amending, or repealing the same.

WILLY P. MANGUM,
President pro Tem. of the Senate.

J. W. JONES,
Speaker of the House of Representatives.

Approved: June 10, 1844.
JOHN TYLER."

I certify that the above is a true copy from the original act in this department.
Department of State, Nov. 22, 1844.

J. C. CALHOUN, *Secretary.*"

94 By unanimous consent and vote the following by-laws were adopted for the government of the corporation of the college:

By-Laws.

Article 1st. The officers of the college shall consist of a president, vice-president, secretary and treasurer, all of whom shall be elected every three years for that term.

Article 2. The president shall have power to receive and dismiss students, and to perform all the usual duties pertaining to the office of president of a literary institution. Also, to sell property, sign deeds, conveyances or any other papers, in the name of the president and directors of this institution.

Article 3. If any affair of importance should occur during the absence of the president the vice-president will call together
95 the board of directors, and the board, after calling in a member or members of this college to fill up the number of the board, namely five persons, shall proceed to business, and the vice-president, with the advice of a majority of the board thus assembled, will act in this case for the president, and when the president and vice-president are both absent, the treasurer will act with the above restrictions.

Article 4. The treasurer shall take charge of all moneys, bonds, notes, mortgages and papers of whatsoever kind. Also the seal of the corporation, and shall give and receive receipts, and perform all the ordinary business transactions of the body.

Article 5. The secretary shall keep a record of the proceedings of the faculty.

Article 6. The above officers shall perform other duties as the faculty or president may from time to time require of them.

Article 7. The body corporate shall have the power to increase their number and fill any vacancies that may occur from time to time in their body, and should a majority deem it necessary to remove any officer they may request his resignation or declare his office vacant and elect another person to fill the same and require the former occupant to deliver up any moneys, papers or anything else belonging to the corporation which he may have had charge of or may have in his possession.

Agreeably to said by-laws the body corporate being in ses-
96 sion, Rev. James Ryder, S. J., was elected president; Rev. Samuel Mulledy, S. J., vice-president; Rev. Thomas Lilly; S. J., treasurer; Rev. James Curley, S. J., secretary.

A common seal was adopted for said college of which seal the following is a correct impression.

Adjourned,

[SEAL.] JAMES CURLEY, *Secretary.*"

"A meeting of the President and Directors of Georgetown College was held at the college building on this, the 24th July, 1844.

* * * * * * *

Rev. Thomas Lilly, S. J., resigned his office as treasurer, and Rev. Ignatius Combs, S. J., was elected to fill the vacancy. Rev. Peter Flannigan, S. J., was elected a member of this corporate body in place of Samuel Barber, S. J. resigned.

Adjourned,

JAMES CURLEY, *Secretary.*"

97 SEPT. 6, 1845.

The President & Directors of Georgetown College met Sept. 6, 1845. The body was called for the purpose of electing officers. The result of the election was as follows, viz:

Rev. Thomas Mulledy, S. J., president;
Rev. Anthony Rey, S. J., V. president;
Rev. Francis Vespre, S. J., treasurer;
Rev. James Curley, S. J., secretary;
Rev. James A. Ward, S. J., director.

Adjourned,

JAS. CURLEY, *Secretary.*"

"AUGUST 13, 1846.

The President and Directors of Georgetown College met August 13, 1846.

Rev. James A. Ward, S. J., was elected vice-president in place of Rev. Anthony Rey, S. J., who lately resigned this office and went as chaplain to U. S. Army in Mexico. Rev. Samuel Mulledy
98 S. J., was elected one of the directors of this body in place of Rev. James A. Ward, S. J., now vice-president.

* * * * * * *

Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 25, 1847.

The corporate body met July 25, 1847.

* * * * * * *

Rev. Thomas M. Jenkins, S. J., was elected a member of this body in place of Rev. Samuel Mulledy, S. J., resigned.

Adjourned.

JAMES CURLEY, *Secretary.*"

"AUGUST 7, 1848.

The President and Directors met August 7, 1848.

Rev. James Ryder, S. J., was elected president. Rev. Angelus Paresce, S. J., was elected vice-president. Rev. Thomas M. Jenkins, S. J., was elected treasurer. Rev. James Ward, S. J., was re-elected director. Rev. James Curley, S. J., was elected secretary.

* * * * * * *

Adjourned,

JAMES CURLEY, *Secretary.*"

99 "SEPT. 8, 1849.

The corporate body met September 8, 1849.

* * * * * * *

Rev. Thomas Jenkins, S. J., resigned his office as treasurer. Rev. Patrick Duddy, S. J., was elected to fill the vacancy.

* * * * * * *

Adjourned,

JAMES CURLEY, *Secretary.*

"SEPT. 10, 1850.

The corporate body met September 10, 1850.

Rev. Daniel Lynch, S. J., was elected vice-president in place of Angelus Paresce, S. J., resigned. Rev. Anthony Ciampi, S. J., was elected in place of James Ward, S. J., resigned.

* * * * * * *

Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 28, 1851.

The corporate body met July 28, 1851.

Rev. Charles H. Stonestreet, S. J., was elected president, his term of office to begin August 1st, 1851, in place of Rev. James Ryder, S. J., resigned. Rev. Bernard Wiget, S. J., was elected one of the directors in place of Rev. Anthony Ciampi, S. J., resigned.

100 * * * * * * *

Adjourned,

JAMES CURLEY, *Secretary.*"

"DEC. 7, 1852.

The President and Directors of Georgetown College met December 7, 1852.

* " " * * * *

Rev. Charles H. Stonestreet, S. J., having been appointed "Præpositus Provincialis" of Maryland, resigned his position as president of Georgetown college; his resignation to be considered as taking effect January 25, 1853. Rev. Bernard A. Maguire, S. J., was then elected president.

Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 11, 1853.

The President and Directors of Georgetown College, met July 11, 1853.

* * * * * * *

Rev. Bernard Wiget, S. J., tendered his resignation as one of the

directors, having received a call to take charge of a congregation, Rev. James Moore, S. J., was then elected a member of this body.

Adjourned,

JAMES CURLEY, *Secretary.*"

101 "JULY 9, 1854.

The President and Directors met July 9, 1854.

* * * * * * *

Rev. Patrick Duddy, S. J. now resigned the office of treasurer; reason alleged, ill-health. Rev. James Clarke, S. J., was elected to fill the vacancy. Rev. James Moore, S. J., tendered his resignation of the office of "a director." Reason, "a call to a mission in the State of Maine." The resignation was accepted, and Rev. Burchard Villiger, S. J., was, on ballot, elected a member of the corporate body.

Adjourned,

JAMES CURLEY, *Secretary.*

"JULY 8, 1855.

The corporate body met July 8, 1855.

* * * * * * *

The Rev. Burchard Villiger, S. J., having been appointed president of St. John's college, Frederick city, Md., resigned his position as "director." Rev. John E. Pallhuber, S. J. was elected to fill the vacancy.

Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 6, 1856.

The corporate body met July 6, 1856.

* * * * * * *

Rev. John E. Pallhuber, S. J., then resigned his position as a member of this body, and Rev. Alphonsus Charlier, S. J.,
102 was elected to fill the vacancy.

Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 5, 1857.

The President and Directors met March 10, 1857.

* * * * * * *

Rev. Daniel Lynch, S. J., resigned his office as vice-president, and Rev. Patrick Duddy, S. J., was elected to fill the vacancy. Mr. Daniel Boone, S. J., was chosen treasurer, in place of Rev. James Clarke, S. J., resigned.

Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 3, 1858.

Resolved at a meeting of the corporate body that the annual commencement of Georgetown college be held July 5, 1858.

* * * * * * *

Rev. Patrick Duddy, S. J., now resigned the office of vice-president; Rev. Joseph Brady, S. J., was elected in his place.
Adjourned,

JAMES CURLEY, *Secretary.*"

"OCTOBER 3, 1858.

At a meeting of the president and directors of Georgetown
103 college held October 3, 1858, Rev. Bernard Maguire, S. J. resigned the office of president. Rev. John Early, S. J., now president of Loyola college, Baltimore, Md., was then chosen president of Georgetown college, D. C., his term of office to commence October 5, 1859.
Adjourned,

JAMES CURLEY, *Secretary.*"

"JULY 3, 1859.

The corporate body met July 3, 1859.

* * * * * * *

The Rev. Robert Brady, S. J., resigned the vice-presidency, and Rev. James Clarke, S. J., was elected to that office. Mr. Daniel A. Boone, S. J., resigned the office of treasurer, and at the earnest request of the body Rev. P. Duddy, S. J., accepted this office.
Adjourned,

JAMES CURLEY, *Secretary.*"

"JUNE 30, 1861.

The corporate body met June 30, 1861.

* * * * * * *

Charles H. Stonestreet was elected vice-president in place of James Clarke, S. J., resigned.
Adjourned,

JAMES CURLEY, *Secretary.*"

104 "JULY 1, 1862.

The corporate body met July 1, 1862.

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Rev. E. McNerhaney, S. J., was elected vice-president in place of Rev. Charles H. Stonestreet, S. J., resigned.
Adjourned,

JAMES CURLEY, *Secretary.*"

"JUNE 30, 1863.

Resolved at a meeting of the corporate body held June 30, 1863, that the annual commencement of Georgetown college be held July 2, 1863.

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Rev. Charles H. Stonestreet, S. J., was elected vice-president in place of Edward McNerhaney, S. J., resigned. Rev. James Tehan, S. J., was chosen one of the directors, in lieu of Rev. Alphonse Charlier, resigned.

Adjourned,

JAMES CURLEY, *Secretary.*"

"AUGUST 10, 1864.

The corporate body met August 10, 1864, for the purpose of electing officers. The result of the election was as follows: Rev. James Ward, S. J., vice-president, in place of Rev. Charles H. Stonestreet, S. J., resigned. Charles Jenkins, S. J., treasurer, in place of Rev. Patrick Duddy, S. J., resigned. Rev. Joseph O'Hagan, S. J.,
105 a director in place of Rev. James Tehan, S. J., resigned.

Adjourned,

JAMES CURLEY, *Secretary.*"

"1865, JANUARY.

The corporate body met on 4th January, 1865, for the purpose of electing officers. The result of the election was as follows:

Rev. John Early, president;
Rev. James Ward, vice-president and director;
Rev. Joseph O'Hagan, director;
Rev. Alphonsus Charlier, director;
Rev. James Curley, director and secretary;
Charles Jenkins, treasurer.

Adjourned,

JAMES CURLEY, *Secretary.*"

"*Proceedings of the President and Directors of Georgetown College.*

SEPTEMBER, 1865.

The corporate body met on the 4th September 1865, the beginning of the scholastic year, for the purpose of electing officers, and the following is the result of the election:

Rev. John Early, president;
Rev. James A. Ward, vice-president and director;
Rev. Albert Peters, director;
Rev. Edmund Young, director and treasurer;
Rev. James Curley, director and secretary.

Adjourned,

JAMES CURLEY."

106 JAN. 1, 1866.

On this day the Rev. Bernard Maguire was elected president of Georgetown college the Rev. Mr. Early having been (2) terms of three years each in the office. The directors are as in the above election.

CURLEY, *Sect.*

107 "*Proceedings of the President and Directors of G. T. College.*

MARCH 4TH, 1867.

On this day the Rev. James Clarke was elected in place of the Rev. E. Young as treasurer of Georgetown college, as well as a director, so that for this year the following are the members:

Rev. Bernard A. Maguire, president,
James Clark, vice-president and treasurer,
James A. Ward,
Charles Jenkins,
James Curley secretary,
} Directors.

JAMES CURLEY, *Secretary.*"

"1868, SEPTEMBER 7TH, MONDAY.

On this day, the first Monday in September, schools commenced.

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The following are the officers and professors for the year September 1868 to July 1869:

President, Bernard A. Maguire;
Directors, R. (V. P.) James Clarke & (prof. math.)
" Rev. Charles K. Jenkins;
" Rev. P. F. Healy, prof. rational philosophy;
" Rev. James Curley, prof. mechan. & astronomy.
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JAMES CURLEY, *Secretary.*"

108 "*Proceedings of the President and Directors of Georgetown College, D. C.*, 1869.

SEPTEMBER, 1869.

At a regular meeting of the president and directors, the Rev. P. Healy was elected vice-president and director of this college. The Rev. Charles Jenkins was elected treasurer and director, and the Rev. John Mullaly a director, so that the following are the legal officers for the present scholastic year:

President, Rev. Bernard A. Maguire;
Vice-president and director, Rev. P. Healy;
Treasurer and director, Rev. Charles Jenkins;
Director, Rev. John Mullaly;
Secretary and director, Rev. James Curley.

JAMES CURLEY, *Secretary.*"

"1870, JULY 4.

At a meeting of the president and directors of Georgetown college.

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Rev. B. A. Maguire sent in his resignation of president of Georgetown college, which was accepted, and the Rev. John Early was appointed to said office as president of Georgetown college. So the president and directors are for 1870–71:

Rev. John Early, president;
Rev. P. Healy, vice-president and director;
109 Rev. Charles Jenkins, director and treasurer;
Rev. John Mullaly, director;
Rev. James Curley, director and secretary.

JAMES CURLEY, *Secretary.*"

"1871, AUGUST.

Proceedings of the President and Directors of Georgetown College.

The Rev. Edmund Young was elected professor of rhetoric and elected one of the directors of this college, in place of Rev. John Mullaly resigned. So the following are the officers of the college for the following scholastic year:

Rev. John Early, president;
Rev. P. Healy, vice-president and director;
Rev. Edmund Young, director;
Rev. Charles Jenkins, director and treasurer;
Rev. James Curley, director and secretary.

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"SEPTEMBER 30, 1872.

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Anthony F. Ciampi is elected a director of the college, as also treasurer of the college (Fr. Jenkins, resigned).

JAMES CURLEY, *Secretary.*"

110 "*Proceedings of the President and Directors of Georgetown College, May* 24, 1873.

The vice-president called a meeting of the directors and announced to them the painful intelligence of the death of the Rev. John Early, S. J., so long and so well known as the popular, much loved president of this college. Before proceeding to the election of a successor to Fr. Early, in accordance with the by-laws, the directors elected Rev. John Sumner a member of the corporation. After the introduction of Fr. Sumner, Rev. E. Young S. J., proposed that the Rev. P. F. Healy, S. J., heretofore V. president, be elected president of the college. The motion was seconded by the treasurer, and unanimously adopted.

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JAMES CURLEY, *Secretary.*"

"SEPTEMBER 13, 1873.

The board of directors met pursuant to a call of the president. As the Rev. A. F. Ciampi has been called to other duties in Frederick city, the board of directors unanimously elected the Rev. Charles K. Jenkins treasurer and V. president of the board.

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JAMES CURLEY, *Secretary.*"

111 "*Proceedings of the President and Directors of Georgetown College, D. C., September* 11, 1874.

At an election this day by the president and three directors of the college, the Rev. John A. Morgan was legally elected as the fourth director. The following are the officers for ensuing scholastic year, viz:

Rev. P. Healy, president.
Rev. Charles K. Jenkins, vice-president and treasurer.
Rev. Edmund I. Young,
Rev. John A. Morgan,
Rev. James Curley, secretary.
} Directors.

JAMES CURLEY, S. J., *Secretary.*"

"FEB. 4, 1875.

At a meeting of the board of directors the following letter was read by the president:

GEORGETOWN COLLEGE, *Feb.* 2, 1875.

President and directors of Georgetown college, D. C.

REV. SIRS: Having accepted the presidency of Gonzaga college, I hereby tender you my resignation of the office of treasurer as well as that of being a member of your honorable board. Whilst placing my resignation in your hands, allow me to express regret at which our pleasant connections are closed. Wishing yourself and college all prosperity.

Yours very truly, CHARLES K. JENKINS, S. J.

112 After the reading of this letter, on motion of the Rev. E. Young the resignation was accepted with proper expressions of regret at the loss sustained. On motion of the same Rev. E. Young the Rev. James Clarke, S. J., was unanimously elected a member of the board of directors and treasurer thereof. After some informal conversation the meeting adjourned.

JAMES CURLEY, *Secretary.*"

"SEPT. 11, 1875.

At a meeting of the board of directors held on this date, there were present, the president, the Rev. P. F. Healy, the secretary the Rev.

James Curley, and the treasurer, the Rev. James Clarke. After the meeting had been called to order the Rev. William B. Cleary was proposed as a member of the board *vice* the Rev. Edmund I. Young, who lately resigned and went to California. The Rev. W. B. Cleary was unanimously elected. And thereafter the Rev. James Clarke, treasurer presented his resignation, as increasing years rendered the office of treasurer too burdensome. After some consultation his resignation was accepted and the Rev. John B. Mullaly was chosen as his successor on the board, and in the office of treasurer.

JAMES CURLEY, S. J., *Secretary.*"

113 "1877, SEPT. 28.

The board met on call.

There were present, the president and the Rev. FF. James Curley, John B. Mullaly and James Clarke. The resignation of the Rev. William B. Cleary was announced and accepted and the Rev. William B. Whiteford was unanimously elected in his stead. The board adjourned at 7.30 p. m.

JAMES CURLEY, S. J., *Secretary.*"

"1878, DEC. 3.

At a meeting of the board Rev. John B. Mullaly was elected to act as president during the absence of the president, Rev. P. F. Healy.

JAMES CURLEY, *Secretary.*"

"Nov. 14, 1879.

The board met on call. There were present the president the Rev. P. F. Healy, S. J., the treasurer the Rev. John B. Mullaly, the secretary, and the Rev. James Clarke. The resignation of the Rev. William Whiteford was presented:

The president and directors of Georgetown college.

GENTLEMEN: As I am called by obedience elsewhere I take leave to present my resignation of the responsible position of director of Georgetown college.

Yours truly, WILLIAM B. WHITEFORD.

Frederick, Nov. 13.

114 The resignation was accepted and the Rev James A. Doonan was unanimously elected to fill the vacancy.

After the Rev. James A. Doonan had been notified and accepted the position tendered to him, the following letter was presented to the board by the Rev. James Clarke:

The President and Directors of Georgetown College.

GENTLEMEN: For reasons well known to your honorable body I desire to be relieved of the responsibility attached to the office of

director of Georgetown college, and hereby tender my resignation to take effect immediately.

Yours truly, JAMES CLARKE.

Nov. 14, 1879."

The board by vote accepted the resignation of the Rev. James Clarke and elected in his stead the Rev. Charles Bahan who was notified and joined in the deliberations of the board, which now consists of the following members:

Rev. P. F. Healy, president,
Rev. John B. Mullaly, vice-president and treasurer;
Rev. James Curley, secretary;
Rev. James A. Doonan,
Rev. Charles Bahan.

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JAMES CURLEY, *Secretary.*"

115 "SEPT. 30, 1880.

The meeting of the directors was held as usual. There were present, besides the president the Rev. Fathers Mullaly, Doonan and Bahan. The following letter from the venerable secretary of the faculty was read:

Dear Father Rector:

I wish you to accept my resignation as the consultor of this college.

In Christ, yours, JAMES CURLEY.

Georgetown college, Sept. 30.

Upon the acceptance of Father Curley's resignation the Rev. William T. Whiteford was duly elected to supply the vacancy, and the Rev. James A. Doonan was chosen secretary to the faculty.

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JAMES A. DOONAN, *Secretary.*"

"SEPT. 6, 1881.

All the board present except Rev. Charles P. Bahan. The resignation of the latter gentleman was announced, accepted, and the Rev. William R. Cowardine was elected to fill the vacancy.

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JAMES A. DOONAN, S. J., *Secretary.*"

116 "FEB. 20, 1882.

All present except Rev. P. F. Healy, president of the board. The secretary laid before the meeting the resignation of the position of president by the Rev. P. F. Healy, which was accepted. On motion Rev. James A. Doonan, S. J. was elected to fill the vacancy. The

Rev. W. T. Whiteford was chosen to fill the office of secretary vacated by the election of the latter official to the presidency of the university.

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W. T. WHITEFORD, S. J., *Secretary.*"

"SEPT. 10, 1882.

The board met. The resignation of Rev. John B. Mullally as treasurer of the college and as a member of the board was read and accepted. Rev. James A. Doonan, the president of the college, was elected to fill the vacant office of treasurer, and Rev. B. Guldner and J. B. Becker were chosen to complete the board.

Adjourned,

W. T. WHITEFORD, S. J., *Secretary.*"

"JUNE 9, 1883.

At a meeting of the board, the first business was the election of a secretary in place of Rev. W. T. Whiteford, deceased, and Rev. James B. Becker was chosen.

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117 Adjourned,

J. B. BECKER, S. J., *Secretary.*"

"SEPT. 17, 1883.

At a meeting of the board the resignations of Rev. James B. Becker and Rev. B. Guldner, were accepted, and Rev. Edward I. Devitt and Rev. M. O'Kane were elected to fill the vacancies. The vacancy left by the death of the Rev. W. T. Whiteford was left open for another meeting. Rev. E. I. Devitt was elected secretary.

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Adjourned,

E. I. DEVITT, *Secretary.*"

"1884, JANUARY.

At a meeting of the board the Rev. Henry J. Shandelle was elected to fill the vacant place on the board.

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"SEPT. 9, 1884.

Meeting of board. Present, Rev. Father Doonan, president, Frs. O'Kane, Devitt. The resignations of Rev. W. R. Cowardine and Rev. Henry J. Shandelle, were accepted, and Rev. Thomas Stack, and Rev. Edward A. Connolly were elected members. Rev. M. A. O'Kane was elected vice-president in place of Rev. William R. Cowardine, resigned.

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118 E. I. DEVITT, *Secretary.*"

"SEPT. 29, 1886.

The first regular meeting of the board for the current scholastic year was convened at 7 p. m.

Present, Rev. James A. Doonan, president and treasurer, Revs. E. I. Devitt and W. R. Cowardine. The resignations of Rev. M. A. O'Kane and E. Connolly were announced, and Revs. J. B. Mullally and S. H. Frisbee were chosen to fill the vacancies. The office of treasurer was resigned by the Rev. J. A. Doonan. Rev. John B. Mullally was elected to fill the place.

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Adjourned,

JOHN B. MULLALLY, *Secretary.*"

"DEC. 8, 1886.

Rev. Edward H. Welsh elected in place of the Rev. Edward I. Devitt, resigned.

Adjourned,

JOHN B. MULLALLY, *Secretary.*"

"MAY 15, 1887.

Regular meeting of the board. All the members present.
119 The names of all who are to renew their vows were gone over.

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JOHN B. MULLALY, *Secretary.*"

"SEPT. 30, 1888.

At a meeting of the board of directors the resignation of Rev. James A. Doonan was accepted and Rev. J. Havens Richards elected to succeed him as president of the board of directors, and Rev. Cornelius Gillespie to succeed him as treasurer. The resignation of Rev. James Collins as vice-president was accepted and Rev. Cornelius Gillespie elected in his place. The resignation of the Rev. Sam. Frisbee as director was accepted and Rev. John F. Lehy and John G. Fox elected as directors. Rev. John F. Lehy was elected secretary.

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JOHN F. LEHY, S. J., *Secretary.*"

"AUG. 20, 1889.

Regular meeting. The full board present. The resignation of the Rev. C. Gillespie as vice-president, treasurer and director was accepted. Also *that* Rev. John Lehy as secretary and director. Rev. Francis B. Goeding, S. J., and Rev. William H. Sumner, S. J., were elected members of the board of directors. Rev. Francis
120 B. Goeding was elected vice-president and Rev. John W. Fox secretary.

Adjourned."

"OCTOBER 6, 1889.

Regular meeting.

The resignation of Rev. Wm. H. Sumner as director was accepted, and Rev. Jerome Daugherty was elected in his place."

"AUGUST 1, 1890.

Called meeting. A quorum present, president in chair. The resignation of Rev. Francis B. Goeding as vice-president and director was received and accepted, and Rev. Edward Connolly was elected a member of the board, and vice-president. Rev. John W. Fox and Rev. Edward H. Welsh resigned their positions as members of the board &c. and Rev. John A. Chester and Rev. Thomas S. Harlin were elected members in their places. Rev. John A. Chester was also elected secretary and treasurer.

Adjourned."

SEPTEMBER 7, 1891.

The first regular meeting of the board was held today, when the resignation of Rev. E. Connolly V. P. was received, and accepted. His resignation as a member of the board was likewise received and accepted. The resignation of the Rev. Thomas Harlin as a
121 member of the board was presented and accepted. Revs. M. H. Obrien and Thomas E. Murphy were elected members of the board and Rev. Thomas Murphy was elected vice-president.

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JOHN A. CHESTER, *Secretary.*"

"OCT. 13, 1892.

First regular meeting of the year. The following members were present: F. F. Richards (president) Murphy (V. pres.) Chester (treas.) Daugherty. The resignation of Rev. Michael H. O'Brien was accepted and Rev. James F. X. Mulvaney was elected a member of the board."

SEPT. 19, 1893.

The president and directors met with the president in the chair. The resignation of the Rev. Thomas E. Murphy as vice-president and member was received and accepted, and the Rev. Jerome Daugherty, already one of the directors was elected vice-president in his stead. Rev. P. H. Brennan was elected a member of the board of directors and immediately began to take part in its deliberations. Rev. John A. Chester secretary and treasurer, resigned from the board and Rev. William H. Duncan was elected a director and treasurer. Rev. James F. X. Mulvaney also handed in his resignation and Rev. James B. Becker was elected a member in his place, and was made secretary *pro tempore.*

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122 Meeting adjourned."

"OCTOBER 4, 1893.

A meeting of the directors was held this day, at which the resignation of the Rev. James B. Becker as director was accepted and the Rev. Thomas S. Harlin was elected to succeed him, and also elected secretary. Hence the board as finally constituted for this year is:

Rev. J. Havens Richards, president.
Rev. Jerome Daugherty, vice-president.
Rev. William H. Duncan, treasurer.
Rev. Thomas S. Harlin, secretary.
Rev. Patrick H. Brennan.

After some discussion of minor points of business the meeting adjourned."

"DEC. 11, 1893.

Usual meeting, all the members present.

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Adjourned, after electing the Rev. Thomas S. Harlin to the office of secretary, which post had been filled by the president since the resignation of the Rev. John A. Chester in September.

"DEC. 27, 1893.

123 All present. The financial statement read by the treasurer was approved. A proposition from the medical faculty was submitted looking to a modification of the financial agreement between that body and the president and directors. This agreement provided that the president and directors should furnish $10,000 (borrowed for the purpose) for the extension and remodeling of the medical building, their own property; that in consideration of this the medical professors after paying the running expenses of the medical school, exclusive of their own salaries, should pay to the president and directors $1500 yearly for five years, after which another agreement should be made. The improvements having cost $3,000 more than the anticipated $10,000 and the medical professors having paid this amount out of the receipts of the school, they now ask to be excused altogether from this annual payment, for the present year and the next following year, that in the third year they should pay us $800, and in the two following $1600 each.

This proposition was unanimously accepted and directions were given to have a supplementary contract embodying these provisions drawn up by our attorneys and duly signed.

Adjourned."

"1894, APRIL 2.

Regular meeting, all the members in attendance. It was announced that the supplementary contract with the medical pro-
124 fessors agreed to in a former meeting, had been consummated and the document signed."

"1894, FRIDAY, *August* 31.

A meeting was held at the call of the president, a quorum being present. The resignation of Rev. Thomas S. Harlin as member of

the board and as secretary was accepted. Also the resignation of the Rev. P. H. Brennan as member. On motion Rev. Edward I. Devitt and Rev. Francis P. Powers were elected members of the corporation. Rev. Francis P. Powers was then elected secretary. Rev. J. Havens Richards re-elected president."

"OCTOBER 5, 1894.

All present except Rev. W. H. Duncan, the treasurer, who having recently suffered a stroke of paralysis while in Alexandria, was lying at the point of death. The resignation of Rev. W. H. Duncan was received and accepted.

On motion the Rev. Edward McTammany was elected a member of the board, and treasurer, to succeed Father Duncan.

Adjourned."

"1895, MONDAY, *Sept.* 16.

The board met as usual, a quorum being present. The resignation of the Rev. Francis P. Powers as vice-president and secretary as well as member of the board was received and accepted, and
125 the Rev. William J. Ennis was elected to succeed him in all these capacities."

"1896, SEPT. 13.

First meeting of the directors for the scholastic year 1896–'97 was held on this day at the call of the president, a quorum present. The resignation of the Rev. Jerome Daugherty as a member of the board was received and accepted, and the Rev. William P. Brett was elected in his place and immediately took part in the proceedings.

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Adjourned."

"SEPT. 11, 1897.

A special meeting of the board was called for the election of officers. Present, Rev. J. H. Richards, president, William P. Brett and E. I. Devitt, constituting a quorum. In the absence of the secretary Rev. William J. Ennis, lately departed for Europe, the Rev. E. I. Devitt was appointed secretary *pro tem.* The written resignation of Rev. W. J. Ennis presented and accepted. Rev. John A. Conway was elected in his place, a member of the board, and being introduced immediately took part in the proceedings. The resignation of Rev. Edward McTammany as member of the board and treasurer, was presented by the president and accepted by the board. Rev. Jerome Daugherty was unanimously elected to fill the vacant place on the board, and on being notified of his election appeared
126 and took part in the subsequent deliberations.

Rev. William P. Brett, having been appointed vice-president of St. Joseph's college, Philadelphia, presented in writing his resignation as a member of this board, and having withdrawn from the meeting his resignation was accepted and Rev. Joseph M. Jerge

was elected to fill the vacancy. The board composed of Rev. J. Havens Richards, E. T. Devitt, John A. Conway, and Jerome Daugherty and Joseph Jerge, the first four mentioned being present, proceeded to the election of officers. It was moved by Rev. John A. Conway and seconded by Rev. Jerome Daugherty that Rev. J. Havens Richards be chosen president of the board and he was elected unanimously. On motion of Rev. E. I. Devitt, seconded by Rev. Jerome Daugherty, Rev. John A. Conway was elected vice-president and secretary. On motion of Rev. E. I. Devitt seconded by Rev. Jerome Daugherty, Rev. Joseph M. Jerge was elected treasurer.

Adjourned,

J. A. CONWAY, *Secretary.*"

"JULY 5, 1898.

A meeting of the board was held at 9 o'clock. All present except Fr. Richards, president. His resignation both as president and as member of the board was offered and accepted. Rev. J. D. Whitney was received as member of board in place of Fr. Richards. He was also immediately elected president.

JOHN A. CONWAY, *Secretary.*"

127

"SEPT. 25, 1898.

Board met at 8 o'clock, when the resignation of Rev. E. I. Devitt as member of the board was read and accepted. Rev. T. O. Leary was proposed in his place and unanimously elected.

J. A. CONWAY, *Secretary.*"

"AUG. 1ST, 1899.

The meeting of the board of directors was called this morning for the purpose of admitting Fr. Edward I. Devitt as a member. Fr. Daugherty was chosen temporary secretary. Fr. Jerge moved the nomination of Fr. Devitt. Fr. O'Leary seconded. The vote was unanimous. Fathers James Becker, Edward McTammany and James Fagan, on the motion of Fr. O'Leary seconded by Fr. Jerge were proposed for membership, and they were duly elected. Fr. Daugherty moved to adjourn. The motion adopted unanimously."

"OCT. 8, 1899.

At a meeting of the board this morning on motion of Fr. Devitt seconded by Fr. McTammany, the resignations of Fr. Jerge, Fr. Daugherty and Fr. Conway were unanimously accepted. On motion of Fr. Devitt, seconded by Fr. McTammany, Fr. Fagan was unanimously elected vice-president, and secretary. Fr. McTammany was proposed as treasurer, and unanimously elected.

JAMES P. FAGAN, S. J., *Secretary.*"

128 "JULY 12, 1901.

A special meeting of board of directors at 9 a. m., present R. R. J. Whitney, Ed. McTammany and E. Devitt, majority and quorum. On motion of Rev. E. Devitt, seconded by Fr. McTammany, Rev. Jerome Daugherty was elected member of the board, and being informed of his election he was present at the subsequent proceedings. A communication was received from Fr. Whitney resigning presidency of the board. It was accepted. On motion of Rev. E. McTammany seconded by Rev. E. Devitt, Rev. Jerome Daugherty was elected president. Fr. Whitney then resigned as member of the board of trustees, which was accepted. There being no other business to be transacted the meeting adjourned.

E. I. DEVITT, S. J.
Secretary pro Tem.

"JULY 31, 1901.

A meeting of the board of trustees was called at 11 a. m. by president, Rev. Jerome Daugherty. Three members were present, the rev. president, the secretary and the treasurer. On motion of treasurer, Rev. E. McTammany, seconded by Rev. Fr. Fagan, the Rev. Clement Lancaster was elected a member of the board. He was at once introduced. Fr. McTammany offered his resignation as treasurer, which was accepted. On motion of Fr. McTammany, seconded by Fr. Fagan, Fr. Lancaster was elected treasurer. Fr. McTammany thereupon offered resignation as member of the board,
129 which was accepted. Meeting then adjourned."

"SEPT. 9, 1901.

Meeting held at 7 p. m., quorum present.

Fr. Fagan's resignation as member and secretary of board received and accepted. Fr. John Conway on motion of Fr. Lancaster, seconded by Fr. J. S. Becker, nominated and unanimously elected member of board. He was also nominated for secretary and elected.

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J. A. CONWAY, S. J.

130 EXHIBIT "H." Filed September 19, 1902.

S. E. K. B.

Liber 4, folio 69 *et seq.*

Certificate of Incorporation.

Fee $1.25.

Certificate of incorporation of the Company of the Medical Department of Georgetown University.

Recorded June 17", 1886—12.40 p. m.

Know all men by these presents that we the undersigned Joseph Tabor Johnson, Karl H. A. Kleinschmidt, J. W. H. Lovejoy, Mason G. Ellzey, Frank Baker, George L. Magruder, and John B. Hamilton citizens of the United States and residents of the District of Columbia have associated and do hereby associate ourselves together as a body corporate under the general incorporation act of Congress enacted for the purpose of conducting an institution of learning in the said District, and we do certify as follows first, the corporate name or title by which said institution shall be known, shall be The Company of the Medical Department of Georgetown University Second the trustees and managers of said institution or body corporate shall be seven in number who shall hold office for one year and until their successors shall be appointed and the undersigned Joseph Taber Johnson, Karl H. A. Kleinschmidt, J. W. H. Lovejoy, Mason G. Ellzey, Frank Baker, George L. Magruder and John B. Hamilton shall be the trustees and managers for the first year Third, the particular branch of science proposed to be taught in and by said institution is the science of medicine, and the special purpose of said body corporate or institution is to conduct the medical department of the university of Georgetown under the superintendence of the President and Directors of Georgetown College. Fourth it is proposed that there shall be seven professorships established in said institution as follows. 1. Professor
131 of obstetrics and gynecology 2. Professor of physiology. 3. Professor of the theory and practice of medicine. 4. Professor of chemistry and of state medicine. 5. Professor of anatomy. 6. Professor of materia medica and therapeutico. 7. Professor of surgery. Whereas it is the intention of the said institution as a body corporate to acquire and hold such real estate and personal property as may be required for the purpose of said medical department and of medical instruction therein; and whereas it is desirable that the interest of the undersigned in the premises should be evidenced by certificates of stock and that such interest may be disposed of and transferred when necessary for the best interests of

the institution there shall be a capital stock of said institution of the nominal par value of twenty one thousand dollars ($21.000,) divided into two hundred and ten shares (210) of the par value of one hundred dollars ($100) each to be divided equally in the first instance between the undersigned incorporators and such shares of stock shall not be assigned transferred or in any manner disposed of except in accordance with the by laws of the institution hereafter to be adopted.

In testimony whereof the undersigned have hereto affixed their hands and seals this 15th day of June A. D. 1886.

JOSEPH TABER JOHNSON, M. D. [SEAL.]
KARL H. A. KLEINSCHMIDT, M. D. [SEAL.]
J. W. LOVEJOY, M. D. [SEAL.]
MASON G. ELLZEY, M. D. [SEAL.]
FRANK BAKER, M. D. [SEAL.]
GEORGE L. MAGRUDER, M. D. [SEAL.]
JOHN B. HAMILTON, M. D. [SEAL.]

DISTRICT OF COLUMBIA, *ss:*

I, Wm. L. Finley a notary public in and for the District of
132 Columbia do hereby certify that Joseph Taber Johnson, Karl H. A. Kleinschmidt, J. W. H. Lovejoy, Mason G. Ellzey, Frank Baker, George L. Magruder, and John B. Hamilton, parties to a certain instrument of writing bearing date the 15th day of June A. D. 1886, and purporting to be a certificate of incorporation and hereto annexed personally appeared before me in the District aforesaid the said Joseph Taber Johnson, Karl H. A. Kleinschmidt, J. W. H. Lovejoy, Mason G. Ellzey, Frank Baker, George L. Magruder and John B. Hamilton being personally well known to me to be the persons who executed said instrument of writing and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this 16th day of June A. D. 1886.

WM. L. FINLEY,
Notary Public.

[NOTARIAL SEAL.]

DISTRICT OF COLUMBIA,
OFFICE OF THE RECORDER OF DEEDS,
November 13, 1901.

This is to certify that the foregoing is a true and verified copy of a certificate of incorporation, and of the whole of such certificate as received for record on the 17th day of June 1886, 12.40 p. m., and recorded in Liber No. 4 fol. 69, *et seq.* one of the incorporation records of the District of Columbia.

[Seal of Recorder of Deeds, D. C.]

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

133 *Deposition on Behalf of Defendant.*

Filed Sept. 19, 1902.

In the Supreme Court of the District of Columbia.

ELENORA D. SPEER
vs.
JAMES MOSHER ET AL. } Equity. No. 22100.

I, John J. Hamilton, an examiner in chancery, in and for the District of Columbia, do hereby certify that the foregoing and annexed deposition was taken down in shorthand in my presence at the time and place set forth in the caption to said deposition from the oral statements of the witness then and there produced before me, said witness having been by me first duly sworn to tell the truth, the whole truth and nothing but the truth touching the matters at issue in said cause.

That thereafter the said deposition was reduced to typewriting, was read over to the witness and [illegible] him subscribed in my presence.

I further certify that I am not [illegible] counsel in said cause or otherwise interested therein; and I return said deposition to the court for such action as to the court may seem proper.

JOHN J. HAMILTON, *Examiner.*

134 In the Supreme Court of the District of Columbia.

ELENORA D. SPEER
vs.
JAMES MOSHER ET AL. } In Equity. No. 22100.

WASHINGTON, D. C., *April 21st*, 1902—3 o'clock p. m.

Met pursuant to agreement.

Present on behalf of the complainant, Marion Erwin, Esq.

Present on behalf of the defendants, Messrs. Hamilton & Colbert.

Whereupon Rev. JEROME DAUGHERTY a witness of lawful age called by and on behalf of the defendants, having been first duly sworn, is examined:

By Mr. COLBERT:

Q. What is your present position?

A. I am president of Georgetown university.

Q. What is the corporate title of that institution?

A. The President and Directors of Georgetown College.

Q. I believe it is already in evidence; but will you please state when the institution was incorporated.

A. It is in evidence. It was incorporated in 1845, I think.

Q. When did you become president of Georgetown college?

135 A. July 11th, 1901.

Q. Who are the officers of that institution at this time?

A. I am the president. The secretary is Father John Conway. The treasurer is Father Clement Lancaster. The other members of the board are Rev. Edward I. Devitt, and Rev. Jas. B. Becker. They form the board of directors.

Q. Who was your predecessor?

A. Father John D. Whitney.

Q. For what length of time did he hold office?

A. For three years and two days.

Q. For three years prior to July, 1901?

A. For three years prior to July, 1901; from 1898.

Q. Who was his predecessor?

A. Father Joseph Havens Richards, who held office for ten years, prior to John D. Whitney's term.

Q. Let me ask you who was the predecessor of Father Richards as president of the college?

A. Father James A. Doonan, who was president for about eight years; I cannot tell you the exact time; but it was in the neighborhood of eight years.

Q. What is the business of Georgetown college; what is the reason of its existence?

A. It is to teach young men directly, as in any other college. We have the classical course. That is the only course we teach in the college. The other objects are, as I stated before, to give these boys a good example, to try to instill good principles into them, and, if possible, to help them to save their souls.

136 Q. How many departments are there connected with Georgetown university, so called?

A. The university is composed of the college, or the undergraduate course, as I call it, of the medical department, which is now composed of two departments, the dental and medical; and the law department. They are the three departments of which I am president and of which I appoint the professors. I have, of course, only a general management of the two departments of medicine and law.

Q. Have you any school of theology connected with Georgetown college?

A. No; we have not.

Q. Will you please tell us what is the difference or distinction between a college, so called, and a university?

A. In order to define a university, we have to take either the German idea or the ordinary idea that we have of a university. Cardinal Newman says that a university, according to his idea, is a place where universal knowledge is taught. Our idea of a university, generally, is that it is a combination of schools in which the professions, usually law, medicine and theology, are taught, and in which there is also an undergraduate department. In England

Oxford university, for instance, as you know, is merely an aggregation of colleges.

Q. Or a great number of colleges?

A. A great number; there are twenty-eight or thirty, or something like that. I do not recall exactly the number. Some
137 things are taught there and other things are not. I do not think there is any medicine taught at Oxford, but they do teach law.

Q. You have at Georgetown university a preparatory school?

A. Yes; a preparatory school.

Q. Then you have an undergraduate department, consisting of freshmen, sophomores, juniors and seniors?

A. Yes.

Q. Leading up to the degree of A. B.?

A. Yes.

Q. Then you have a post graduate course?

A. We have a course leading to the degree of master of arts and also leading to the degree of doctor of philosophy—Ph. D.

Q. You call that course a post graduate course?

A. Yes, a post graduate course.

Q. You have the law department?

A. Yes.

Q. And the medical department?

A. Yes.

Q. And a dental department?

A. Yes; the dental and medical departments are properly together.

Q. But you have no theological department?

A. No theological department.

Q. Is there any religion taught in your law school?

A. No.

Q. Is there any religion taught in your medical or dental schools?

138 A. No. I have something to correct in my previous testimony. The fact is, I tried to find out the religion of the boys in the law school and the medical school, because I have unfortunately given some testimony which I think needs correction. We do not ask, in those schools, what is the religion of a student. I think I may venture to say that if not one half, certainly one third, in each school is non Catholic.

Q. Have you any religious standard or test governing the admission of students to the college proper?

A. No; not to any part of the university. It is specially put down that there is no exclusion on account of religious belief.

Q. What religious instruction do you have in either the preparatory school or the undergraduate classes?

A. The religious instruction, strictly so-called, is a catechetical lesson.

Q. That is a lesson by question and answer?

A. It is a lesson in the catechism. You have seen the higher

catechism; but I do not think we put in evidence the smaller one. Then there is, once every week, a lecture for from thirty to thirty five minutes by one of the professors. That is a more advanced order of lecture.

Q. Once a week, you say?

A. Yes, sir.

Q. On what subject?

A. On Christian doctrine. They generally divide the whole Christian doctrine into three portions, and then they treat each portion. One year they treat the creed, which is dogmatic. The
139 next year they treat the sacrament, and the third year they treat the commandments. In that way they go over the matter once every three years.

Q. In the delivery of that course of lectures, is the subject matter based upon the doctrine and tenets of the Catholic religion?

A. Yes.

Q. Are all of your students required to attend those lectures?

A. No; nobody is required to attend them; and some of them do not attend them. If the boys' parents were to object, we would not oblige them to a-tend.

Q. I believe it is a fact that on one occasion a Jew took the first prize in the Christian doctrine?

A. Yes; and a Georgian Jew, by the way.

Q. What is the popular name of the institution whose corporate title is "The President and Directors of Georgetown College;" how is it generally known in this community and throughout the United States?

A. It is known now as Georgetown university, I think.

Q. Or the University of Georgetown?

A. Yes; or the varsity.

Q. Is it sometimes known as Georgetown college?

A. Yes; or as simply "Georgetown." If you will look in the papers you will find it referred to as "Georgetown," if there is any talk about schools, just the same as they refer to "Harvard" and "Pennsylvania," and other places. They say simply "Georgetown." They are brought in together.

Q. By what authority are you appointed president of
140 Georgetown college?

A. The board of directors appoint me, president of Georgetown college.

Q. By whom was the board of directors elected or appointed?

A. The board of directors appoint themselves. In order to maintain the corporate existence of the college, if one man has to leave, and as Jesuits we have to leave when we receive orders, another man is elected; and the one who has to leave resigns and the new man takes his place.

Q. Of course this corporation known as "The President and Directors of Georgetown College" is not a stock corporation?

A. No.

Q. You have no stock?

A. No; our stock is all here, in our arms and heads.

Q. How many members of your community are there in Georgetown college at this time?

A. I cannot tell you at this moment. I will say that we number about forty-five; but I cannot tell you precisely I would have to go home and look at my catalogues in order to tell.

By Mr. ERWIN:

Q. You mean professors?

A. Professors; and those who help in the house—the brothers.

By Mr. COLBERT:

Q. How many individuals at present compose the institution or corporation known as "The President and Directors of Georgetown College"?

141 A. I gave the number of my community. Of course they are not college members, strictly speaking; but they belong to the community. The directors, teachers, professors, prefects and subordinates in the college number about twenty five.

Q. I believe you have already testified, when you were on the stand before, that all of the members of Georgetown college are Jesuits?

A. No; not all connected with the college. We have secular teachers. We have a teacher of physiology, a teacher of French, and they do not belong to the Jesuit order at all.

Q. They are employed on a salary?

A. They are employed on a salary.

Q. Are the Jesuits preachers, strictly so called, or are they teachers?

A. They are both. I believe I testified here that the society was instituted for the purpose of doing mission work and for teaching; for foreign mission work; particularly, and for teaching. That is the reason that the first people in this country, in almost every part of it, were Jesuits. I mean the first ministers of the gospel. Our special work is to teach.

Q. Since you have been connected with Georgetown college, has any member of Georgetown college done any missionary work, representing the college?

A. No; we cannot do that. If a man teaches he has to attend to that and that only.

142 Q. How long, in one way or another, have you been connected with Georgetown college?

A. I am not sure whether it is eleven or thirteen years. I began teaching in Georgetown in 1872, thirty years ago. I have been connected with the college, off and on, ever since.

Q. You mean that your actual term of service with the college has been either eleven or thirteen years?

A. Yes.

Q. Extending over a period of thirty years?

A. Yes, sir; over a period of thirty years.

Q. It is alleged in the bill that there is no charter power in "The President and Directors of Georgetown College" authorizing them to prosecute research into the colonial history of Maryland and the District of Columbia. What have you to say about that?

A. That is a most extraordinary assertion. That is all I have to say about it.

Mr. ERWIN: I object to the question and to any answer thereto because it is a question of law, to be determined upon an inspection of the charter and not by oral testimony.

By Mr. COLBERT:

Q. Let me ask you if you have ever made any investigations or researches of that kind in Georgetown college?

A. Certainly; we have the greatest historian in the society in Georgetown college, Father Devitt, one of the members of the board, and he is recognized among our people as a great authority on history and on colonial history particularly.

Q. You have people who attend to that particular branch
143 of study and investigation.

A. Yes; we have. In fact there is no branch of study that the society does not take up. There are a few, like parts of physiology, that we are not allowed to take, under our rules; but other than that we take up every branch and every portion of every branch of learning.

Cross-examination.

By Mr. ERWIN:

Q. Father Daugherty, you have testified twice in this matter before the examiner?

A. Yes.

Q. Do you desire to correct anything in the first examination?

A. No; I have read that over and I think it is just as I stated it before you. My idea was to see that the testimony really represented what I said to you, and that is what I take it to mean; and I believe that there is no inaccuracy in it. I looked at it particularly, in order to see that it was what I thought I had stated in your presence.

Q. The testimony, then, in the first examination of November 30th, 1901, which you signed and made affidavit to in December, 1901, is substanially correct?

A. Yes.

Q. Taking up the examination which took place on January 25th, 1902, in which you now state that there are some corrections which ought to be made, I will ask you to glance over it and to call attention to any particular thing which you want to correct, so
144 that we will know whether or not the balance of your deposition is to stand. Please refer to your deposition, which you gave when you were examined by counsel for the complainants, and read the part of it which you now want to modify or correct.

A. The testimony on page 12. (red mark p. 19) at the bottom of the page, reads as follows:

Q. Can you tell me roughly what is the proportion of non-Catholic to the number of students, to-day?

"A. I have no idea.

"Q. Small or not?

"A. Small; I cannot tell you exactly how many.

"Q. Quite a number; are there not?

"A. I would not say that. I am not prepared to say that there are more than eight or ten Protestant boys in the college."

What I wish to add to that is, in these answers, I exclude the medical and law schools. This applies merely to the college proper.

Q. Outside of the correction which you now make, the testimony which you gave on the previous examination, when you were examined by me, is correct?

A. It is correct. I made some little corrections in it before I signed it. I made some little verbal corrections; and if this includes those corrections I made; a few days afterwards, I am willing to swear that it is what I said to you, and it is true. This testimony, to which I have referred, is also perfectly true; but I was afraid you might misunderstand it. I say that I am perfectly willing to take advantage of you; but not in that way.

145 By Mr. COLBERT:

Q. What do you mean by saying that you are willing to take advantage of him?

A. I mean to say that if I could gain the suit I would be perfectly delighted to do it.

Q. By legitimate means?

A. Of course that is what I mean. I feel that, in giving my testimony, I am obliged to state the facts. I merely made that remark in order to show him that I had no desire to mislead him; because he might have thought that there were only eight or ten boys, other than Catholics, in the whole university.

By Mr. ERWIN:

Q. Your medical department has a separate charter which we put in evidence, has it not?

A. The medical department, at the start, had a charter of its own. I told you, if I mistake not, that the reason for that was that we did not have the money to put up a building for the medical school. Some doctors got together and formed this body in order to hold the property in which they gave their lectures. We afterwards bought that property from them and assumed all their indebtedness and the charter by which they held the land lapsed. We always gave the degrees in the medical school. They never had any charter to give degrees in medicine and we always did that. The only purpose for which the charter was obtained was to hold this property, of which I have spoken.

Q. You do not change your testimony on the point that these

catalogues correctly set out what you do teach at the
146 university?

A. I stand by what is there.

Q. And you also stand by your testimony to the effect that these text books which were put in evidence at the last hearing as exhibits, that is De Harbe's Catechism, the Handbook of the Christian Religion by Wilmer, S. J., and the History of the Catholic Church by Noethen are the text-books used in the college, as set out in the catalogue?

A. Yes, sir; they were; at the time at which those catalogues were in force. Of course we may make a change and take another history; but the books to which you refer were used there at that time. Now we teach substantially that.

Q. On page 18 of Exhibit B, Georgetown College Catalogues of 1899–'90 I see this: "Catechism forms one of the regular class recitations and weekly catechetical lectures are attended by all." That is correct, is it not?

A. Yes; that is correct. It is a regular lesson. The lecture there referred to is the one I mentioned, and is a lecture of only thirty minutes every week.

Q. All students are required to attend?

A. I told you that as a matter of discipline they are obliged to go; but if any boy were to object to going to any religious services, provided it did not interfere with ordinary discipline, we would not make it obligatory upon him.

Q. All students are required to be present at the public religious exercises?

A. That is true; but "all" there does not mean absolutely
147 every one; it means merely that that is the rule of the college?

Q. The name "Georgetown university" is not contained in the charter under which you are operating? Where does it come from? Is it merely a popular use of the word?

A. That is all. It came, originally, when we had first the medical and then the law department. We then considered ourselves something of a university, but we never applied for any change of the charter. We did not feel that there was any necessity for going to Congress, as we have to do here, to get a new charter just because these schools were united with us. For that reason we have kept as the corporate title "The President and Directors of Georgetown College."

Q. You have explained that "The President and Directors of Georgetown College" as an organization, perpetuates itself by the board electing a new man whenever one member resigns or retires.

A. Yes.

Q. That board consists or four or five members, does it not?

A. Four or five always. We never have less than four, as far as I remember.

Q. And the board, including the president and the board of directors, are always Jesuits; are they not?

A. Yes; they are always Jesuits.

Q. And always have been, according to the record that is in evidence, have they not?

A. I take it that from the time of the charter they have always been Jesuits.

148 Q. The professors and the lay brothers who assist in and about the college work are chosen by the board, as I understand it?

A. They are chosen in part, by the board. When you come to ask a big question like this, you must remember that I have to run two things. I am the rector of the religious community as well as president of the college. The body of men there represents not only the men who work in the college, but also others who do housework and things of that kind. I think I have told you that we have no women about our house, so the work all has to be done either by our own brothers or by servants in the house, and they are men, of course. When I testified, as I did, that there were about forty-five members there, I included every one, that is needed, for instance, to keep our rooms in order and to keep the place in order. They are so many men billeted to me, so many assigned to that community, and the superior sends those men there. Of course I try to put the men where they will do the most good. For instance, if a man is good in physics I would not put him at anything else if I could help it, and the same is true in regard to chemistry. The natural selection is made based upon the knowledge we have of our own men. For instance, my man in chemistry died this year and I naturally I had to tell my superior that he must send me a man to take his place. He sent me a man but did not send me a chemist, and I had to take a chemist in the house away from other work and put him into the chemistry department. And so it lies between the board and my superior, who, as I explained to you before, runs the
149 whole province.

Q. Then, as I understand it, the superior of the Order of Jesuits chooses for his province, which I suppose, includes certain portions of the United States?

A. Yes; certain particular towns. Our province runs from Massachusetts to the District of Columbia. We have a house in New York, one in Boston, one in Philadelphia, one in Baltimore and so it goes.

Q. Then the superior of your order assigns to you, as president of the board of directors, of Georgetown college, so many men for you to utilize as professors in your college work here?

A. Certainly.

Q. And as president of the college, you and your directors, who are also members of the same order, put these men who are assigned to you in certain places in the college and they do the work?

A. Yes; that is the way it is done. For instance, suppose I need a teacher of rhetoric at the end of this year. I will tell him that, next year, he must provide a good man in rhetoric for me, and that I will need a teacher for the junior year and I want him to look out

for a man for me. He then says: "You shall have him." If I find that a man is breaking down or has to give up his studies, that is the way it is done.

Q. And if one of the members of the board of directors has served for a certain number of years, or for a certain length of time, and the superior wants to change him to another position in another college or to send him to other work, he resigns, and the su-
150 perior designates who is to be elected in his place?

A. No; he does not generally do that. Of course there are certain positions in the house, such as the president, the treasurer and the secretary, who are appointed. This is the way it is done. For instance, if a man is in bad health, who is one of the board of directors. The superior will say: "You will have to let Father So and So go at the end of this year." I will say: "That is all right; you send me a man." When it comes to the end of the year, in July, I have a meeting of my board and this man is proposed as a member of the board. Then the man who is to be removed sends in his resignation and that is accepted. That is the way we do it.

Q. As I understand it, the superior, when he finds that there is some man who, either through sickness or otherwise, has become unfitted to carry on the work and must leave, sends some other man to take his place. Then your board of directors elects that man into his position on the board?

A. Yes. Of course, strictly speaking, he does not do that, but it amounts to practically that. I may take some other man in the community for a director. All I want to show you is the general way in which the thing is managed. That is, if a man breaks down in health, it is his business to see that my college is provided with proper teachers and professors. Of course the positions of president and directors, between ourselves, does not amount to so much so far as the Jesuits are concerned. It is only a disagreeable duty to have to attend to meetings and to go through the
151 business and such things as that, but we have to do it in order to maintain our legal existence. So far as the Jesuits are concerned, it does not amount to anything whether one is a member of the board of directors or not, except for the legal part of it.

Q. You carry out that in order to conform to the law?

A. Yes; and in order to attend to business as we are doing now.

Q. Your conduct, of course, is regulated by the rules of the order?

A. Yes; those are common to every Jesuit, as I have told you before.

(The further taking of these depositions was thereupon adjourned.)

JEROME DAUGHERTY, S. J.

Subscribed and sworn to before me this 6th day of May, 1902.

JOHN J. HAMILTON,
Examiner in Chancery.

152 *Stipulation. Filed Nov.* 17, 1902.

In the Supreme Court of the District of Columbia.

ELANORA D. SPEER ET AL.
vs.
JAMES MOSHER, Trustee, ET AL. } In Equity. No. 22100.

It is agreed between the parties as follows:

1. That the matters of fact admitted in the answer of M. J. Colbert, trustee, to the bill in this cause are admitted for each of the defendants represented by said M. J. Colbert as solicitor.

2. That the last will and testament of Ethelbert Carroll Morgam, a copy of which is attached to complainants' bill, shall be taken in this cause as proved for all purposes, either party reserving the right to refer to the original will in the register's office for correction of clerical errors in the copy, if any exists.

3. That the certified copy of decree of January 12, 1895, in equity cause No. 16147, substituting trustees and the certified copy of decree of April 1, 1897, in equity cause No. 18045, substituting trustees, which are hereto attached, shall be admitted in evidence, without the necessity of offering the whole record in said respective causes, to show the jurisdiction of the court over the subject matter and parties in rendering said decrees.

4. That James Dudley Morgan, Cecil Morgan, the brothers of said Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, Ada M. Hill, and Eleanora D. Speer, the sisters of said Ethelbert
153 Carroll Morgan are the heirs at law and next of kin of said Ethelbert Carroll Morgan.

Oct. 30, 1902.

MARION ERWIN,
Solicitor for Compl't.
HAMILTON & COLBERT,
Solicitors for Certain Defendants.
CONWAY ROBINSON,
Sol'r for James Mosher, Substituted Trustee.

154 Filed April 1, 1897. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

EMORY SPEER and JAMES MOSHER, Two of the Administrators *d. b. n., c. t. a.*, of James E. Morgan, Deceased, *vs.* JAMES DUDLEY MORGAN and ANNA M. Mosher, Executors of the Last Will and Testament of Nora Morgan, Deceased, *et al.*	In Equity.	Bill. No. 18045.
ANNA M. MOSHER, One of the Executors of the Last Will and Testament of Nora Morgan, Deceased, *vs.* EMORY SPEER, JAMES DUDLEY MORGAN, Cecil Morgan, James Mosher, and Richard S. Hill, Administrators *d. b. n., c. t. a.*, of James E. Morgan, Deceased, *et al.*	In Equity.	Cross Bill.
ELEANORA D. SPEER, by Marion Erwin, Her *Prochein Ami*, *vs.* EMORY SPEER, JAMES DUDLEY MORGAN, Cecil Morgan, James Mosher, and Richard S. Hill, Administrators *d. b. n., c. t. a.*, of James E. Morgan, Deceased, *et al.*	In Equity.	Cross Bill.

On this 1st day of April, A. D. 1897, the proceedings having been read and considered by consent of all parties hereto:

(1.) And it appearing to the court that on the 22nd day of August, 1896, in equity cause No. 17,615 in this court, James Dudley Morgan, Cecil Morgan, Emory Speer, Richard S. Hill and James Mosher, were, by the order and decree of the court, appointed trustees in lieu of William J. Stephenson and Daniel B. Clark, the trus-

155 tees mentioned in said last will and testament of James E. Morgan, and that said James Dudley Morgan, Cecil Morgan, Emory Speer, Richard S. Hill and James Mosher were by said order and decree invested with all the powers, duties and trusts created by said will in the trustees therein mentioned, with power and authority to perform and execute said trusts as if they had been originally mentioned in said will in lieu of said Stephenson and Clark.

(2.) And it further appearing to the court that said substituted trustees, James Dudley Morgan, Cecil Morgan, Emory Speer, Richard S. Hill and James Mosher as such collected nothing from the

estate of James E. Morgan except the sum of $1140.94 from the rent of real estate, and that said substituted trustees have fully accounted for and paid over all of the same to their *cestui que trusts*, as directed by said will of James E. Morgan, and that said *cestui que trusts* have fully receipted for and acquitted said substituted trustees as to the same, it is therefore ordered and decreed that the accounts of said trustees attached and referred to in their respective answers, with the vouchers thereto, be, and the same are hereby, approved, and entered settled.

(3.) It further appearing to the court that the said Eleanora D. Speer, Anna M. Mosher and Ada M. Hill are lawfully entitled to have a partition as between themselves of the property or proceeds thereof, constituting that part of the three-sixths of the estate of James E. Morgan, the income from which is directed by said will to be paid by said trustees, one-third to each of said three daughters of said James E. Morgan during her life, and it further appear-
156 ing to the court that it is to the benefit and advantage of all concerned that there should be a separate trustee for each of the three shares of the estate of said James E. Morgan, which by his said will he so directed to be held in trust.

(4.) And it further appearing to the court that said James Dudley Morgan, Cecil Morgan, Emory Speer, Richard S. Hill and James Mosher have tendered their resignations as such trustees to this court: it is therefore considered ordered, adjudged and decreed by the court that the resignations of said James Dudley Morgan, Cecil Morgan, Emory Speer, Richard S. Hill and James Mosher as trustees and substituted trustees under the order made by this court in equity cause No. 17615, as hereinbefore stated, be, and the same is hereby, accepted, and they are hereby fully discharged as such trustees.

(5.) It is ordered, adjudged and decreed by the court that Emory Speer be, and he is hereby, appointed trustee in lieu of said trustees resigned as aforesaid, of the one sixth part of the estate of James E. Morgan, inclusive of twenty thousand dollars of District of Columbia 3-65 bonds, and exclusive of the $5,000.00 left by said will to said Eleanora D. Speer in her own right, to have and to hold the same in trust under the terms of said will, and the rents, issues and profits thereof to pay exclusively to said Eleanora D. Speer during her life, and on the death of said Eleanora D. Speer to pay and give both principal and interest in absolute estate by such conveyance or other instrument as may be necessary, to the issue of said Eleanora D. Speer, living at her death, or if said Eleanora D. Speer shall die without such issue, then to pay and give as aforesaid, both
157 principal and interest to such person, persons, use or uses as said Eleanora D. Speer so dying without issue living at her death, shall by her last will, and testament indicate, designate and appoint; and the interest of said Eleanora D. Speer under said will and by virtue hereof to be her sole and separate estate, free from the control of any present or future husband, and without any liability whatever for him or on his account. And the said trustee

hereby appointed is as to said one-sixth share of said estate of James E. Morgan, of which he is appointed trustee, invested with the same power and authority to perform and execute said trust as if he had been originally mentioned in said will, in lieu of the said Stephenson and Clark, the trustees mentioned in the said will.

(6.) It is further ordered, adjudged and decreed by the court that James Mosher be, and he is hereby appointed trustee in lieu of said trustees resigned as aforesaid, of the one-sixth part of the estate of James E. Morgan, inclusive of twenty thousand dollars of the District of Columbia 3-65 bonds, and exclusive of the $5,000.00 left by said will to said Anna M. Mosher in her own right, to have and to hold the same in trust under the terms of said will, and the rents, issues and profits thereof to pay exclusively to said Anna M. Mosher during her life, and on the death of said Anna M. Mosher, to pay and give both principal and interest in absolute estate by such conveyance or other instrument as may be neeessary, to the issue of said Anna M. Mosher living at her death, or if said Anna M. Mosher shall die without such issue, then to pay and give as afore-
158 said, both principal and interest to such person, persons, use or uses as said Anna M. Mosher so dying without issue living at her death, shall by her last will and testament, indicate, designate and appoint; and the interest of said Anna M. Mosher under said will and by virtue hereof to be her sole and separate estate, free from the control of any present or future husband, and without any liability whatever for him or on his account. And the said trustee hereby appointed is, as to said one-sixth share of said estate of James E. Morgan of which he is appointed trustee, invested with the same power and authority to perform and execute said trust as if he had been originally mentioned in said will, in lieu of the said Stephenson and Clark, the trustees named in said will.

(7.) It is further ordered, adjudged and decreed by the court that Richard S. Hill be, and he is hereby, appointed trustee in lieu of said trustees resigned as aforesaid, of the one-sixth part of the estate of James E. Morgan, inclusive of twenty thousand dollars of District of Columbia 3-65 bonds, and exclusive of the $5,000.00 left by said will to said Ada M. Hill in her own right, to have and to hold the same in trust under the terms of said will, and the rents, issues and profits thereof to pay exclusively to said Ada M. Hill during her life, and on the death of said Ada M. Hill to pay and give both principal and interest in absolute estate, by such conveyance or other instrument, as may be necessary, to the issue of said Ada M. Hill, living at her death, or if said Ada M. Hill shall die without such issue, then to pay and give as aforesaid, both principal
159 and interest, to such person, persons, use or uses as said Ada M. Hill so dying without issue living at her death, shall by her last will and testament indicate, designate and appoint; and the interest of said Ada M. Hill under said will, and by virtue hereof to be her sold and separate estate, free from the control of any present or future husband, and without any liability whatever for him or on his account. And the said trustee hereby appointed

is, as to said one-sixth share of said estate of James E. Morgan of which he is appointed trustee, invested with the same power and authority to perform and execute said trust, as if he had been originally mentioned in said will, in lieu of the said Stephenson and Clark, the trustees named in the said will.

(8.) Each of the said trustees hereby appointed for each of said respective shares are each required to file in this court a good and sufficient bond, each in the sum of forty thousand dollars, conditioned for a faithful performance of his duties as such trustee, and to be approved by a judge of this court, and no one of them is to enter upon the discharge of his duties as such trustees until his bond has been approved and filed in this court.

(9.) Each of said substituted trustees hereby appointed, are hereby made parties defendant to the bill and cross-bills filed in this cause, in lieu of the said trustees resigned, so far as the same may affect the trusts conferred upon them by this order and decree, upon each of them respectively filing in this cause his written accept-
160 ance of such trust and submission to the jurisdiction of this court.

W. S. COX, *J.*

I consent to the foregoing decree.

M. J. COLBERT,
Substituted Trustee under the Will of Ethelbert Carroll Morgan, Deceased.

We consent, M'ch 30, 1897.

HAMILTON & COLBERT, *Solicitors.*

I consent to this decree.

FRANKLIN H. MACKEY,
Sol. for Magruder, Surviving Executor of E. Carroll Morgan.

A true copy.
Test: J. R. YOUNG, *Clerk,*
By R. J. MEIGS, JR., *Asst Clerk.*

[Seal of Supreme Court of D. C.]

161 Filed January 12, 1895. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Sitting as a Court of Equity.

ELLENORE SPEER ET AL. *vs.* JOHN H. MAGRUDER, &C. } Equity. No. 16147, Doc. 38.

This cause coming on to be heard upon the bill or petition, and answer, and having been fully considered by the court, it is this twelfth day of January, 1895, adjudged, ordered and decreed that

James Mosher and Michael J. Colbert be, and they are hereby, appointed, in the place and stead of William J. Stevenson, deceased, and John H. Magruder, whose resignation is hereby accepted, trustees under the will of Ethelbert Carroll Morgan, lately deceased, and that the said John H. Magruder be, and he is hereby directed to turn over to the said Mosher and Colbert, hereby appointed trustees, the stocks, bonds, money and personal property described in the bill or petition in this cause filed. And it is further adjudged, ordered and decreed that the title to the house and premises known and described as No. 918 E street, N. W., and mentioned and set forth in the will of said Ethelbert Carroll Morgan, deceased, be and the same is divested out of the said John H. Magruder, trustee, and surviving trustee, and is hereby vested in the said James Mosher and Michael J. Colbert, trustees, to be held, managed and disposed of by them according to the terms and provisions of said will.

162 And it is further ordered that said James Mosher and Michael J. Colbert before entering upon the performance of this trust shall give their separate bond for the faithful performance of their duties in the sum of $10,000. with surety or sureties to be approved by this court.

W. S. COX, *J.*

A true copy.
Test: J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

[Seal of Supreme Court of D. C.]

163 *Decree. Filed May* 21, 1903.

In the Supreme Court of the District of Columbia, May Term, 1903.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend,
vs.
JAMES MOSHER and MICHAEL J. COLBERT, Trustees, *et al.*
} In Eq. No. 22100.

Decree.

This cause came on for hearing upon the bill, answers, testimony and all other proceedings, and was argued by counsel, and considered by the court.

It is thereupon, this 21st day of May, 1903, by the court and the authority thereof, adjudged, ordered and decreed:

First. That the clauses and sub-clauses contained in the last will and testament of Ethelbert Carroll Morgan, which in the bill of complaint and in the opinion filed herein are designated as "*a*" and "*b*" respectively, are held and declared to be valid and effectual devises and bequests. So that under said subclause "*a*" of said will,

all of said property, real, personal and mixed, of which the said Ethelbert Carroll Morgan was seized and possessed at the time of his death (other than his share under his father's will of which he would become possessed at his mother's death) to which said subclause "*a*" is applicable, shall be held by said James Mosher and Michael J. Colbert, substituted trustees under said will upon
164 the uses and trusts, and under the limitations and conditions set forth in said subclause "*a*" viz: To apply the income and profits to the use and benefit of said testator's two sisters Eleanora D. Speer and Minnie Mosher, (otherwise known as Anna M. Mosher) on equal parts during their lives, and at their death to deliver and convey each sister's share to her issue, and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her.

Second. That if his (testator's) said two sisters shall both die leaving no issue living at their deaths, then said substituted trustees shall under said subclause "*b*" deliver and convey all the property and estate to which said subclause "*b*" is applicable" to the President and Directors of Georgetown College, in the District of Columbia, to be an endowment in equal shares of the literary and medical schools connected with said college; and said President and Directors of Georgetown College are entitled to receive the same.

Third. That the clauses and subclauses of said last will and testament of Ethelbert Carroll Morgan, designated, in the bill of complaint, and in the opinion of the court filed herein as clauses *c*, *d*, *e*, *f*, *g*, and *h*, are and each of them is held and declared to be void and invalid, and of no effect, and that the bequests attempted to be made by said sub-clauses, or to which said sub-clauses are applicable, have lapsed and become inoperative; and further, that all of said void and lapsed legacies *being* bequests of money, fallen into the
165 residuum of the estate of the said testator Ethelbert Carroll Morgan, and pass to the beneficiaries under the terms of the residuary clause of said will designated in the bill of complaint and the opinion of the court filed herein as clause "*i*" which clause is hereby held, declared and decreed to be valid and effectual.

And further that said substituted trustees James Mosher and Michael J. Colbert hold the said property bequeathed under said residuary clause of said will designated as clause "*i*," including the void and lapsed legacies falling into the same as aforesaid, for the benefit of his (Ethelbert Carroll Morgan's) aforesaid sisters Eleanora and Minnie, upon the same limitations and conditions, remainders and powers and in the same manner as the substituted trustees under his father's will, hold, retain and possess the remainder and bulk of the respective shares of his (Ethelbert Carroll Morgan's) said two sisters, as construed by this court in equity cause No. 18045.

Fourth. It is further adjudged, ordered and decreed that the said James Mosher and Michael J. Colbert, the substituted trustees herein, shall account in this court of and concerning the moneys and properties derived from the estate of said Ethelbert Carroll

Morgan, that the same may be distributed, as far as the same is at this time distributable, among the respective parties entitled to share in such distribution according to the provisions of this decree, and the cause is hereby referred to the auditor of the court to state such account.

And further, that the costs of this suit, including a reason-
166 able counsel fee to the complainant's solicitors, for bringing under these proceedings said void and lapsed legacies into the residuary clause, and a reasonable counsel fee to the solicitors for the respective trustees for representing such trustees in the cause, shall be allowed and paid out of the fund arising from said void and lapsed legacies, said solicitors' fees to be passed upon by the auditor and reported to the court.

A. B. HAGNER,
Asso. Justice.

167 *Order Fixing Penalties of Appeal Bond. Filed May* 21, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, &c., *vs.* JAMES MOSHER ET AL. } Eq. No. 22100.

It is by the court this 21st day of May, A. D. 1903 ordered that the penalty of the bond on appeal to the Court of Appeals of the District of Columbia to be given by the defendants (other than James Mosher, trustee, and Anna M. Mosher) be fixed at the sum of one thousand dollars ($1000—) said bond to operate as a supersedeas, and that the penalty of the bond to be given by the defendants James Mosher trustee and Anna M. Mosher, on appeal to said Court of Appeals, be fixed at the sum of one hundred dollars ($100.00) said bond to be for costs, and it is further ordered that the penalty of the bond to be given by the complainant on appeal to said Court of Appeals be fixed at the sum of one hundred dollars ($100.00) said bond to be for costs, all of said appeals being from the final decree entered herein on this 21st day of May A. D. 1903, and this day taken in open court by the said parties respectively, are hereby allowed.

A. B. HAGNER, *Justice.*

168 *Opinion of the Court. Filed May* 22, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend,
vs.
JAMES MOSHER and MICHAEL J. COLBERT, Trustees, *et al.*
} In Equity. No. 22100.

Opinion by Mr. Justice Hagner.

This suit, brought to obtain a judicial construction of the last will and testament of Ethelbert Carroll Morgan, late of the District of Columbia, was filed on the 5th of March 1901. The defendants impleaded by the bill are described therein as Michael J. Colbert and James Mosher, substituted trustees under the will; John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, and Edward I. Devitt, representing themselves to be the President and Directors of Georgetown College; The St. Vincent's Orphan Asylum, a corporation resident in the District of Columbia, The Trustees of St. Joseph's Male Orphan Asylum, a corporation resident in the District of Columbia, and Anna M. Mosher, a resident of the city of New York.

The bill in detail attacks the validity of many of the dispositions of the said will, which was made within one calendar month
169 of the death of the testator, upon the ground that it contains gifts and devises to ministers of the gospel as such, or for the benefit of a religious sect, in contravention of the provisions of section 437 of the Revised Statutes of the District of Columbia, which adopted (except as to devises and gifts made more than thirty days before the death of the testator) the provisions of the 34th article of the bill of rights of the State of Maryland, which is in these words:

"Every gift, sale or devise of lands to any minister public teacher or preacher of the gospel as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination; every gift or sale of goods or chattels to go in succession or take place after the death of the seller or donor to or for such support, use or benefit and also every devise of goods or chattels to or for the support, use or benefit of any minister public teacher, or preacher of the gospel as such, or any religious sect, order or denomination, without leave of the legislature."

It also insists that the several legatees and devisees described therein as "the Georgetown university" or the "University of

Georgetown" and the literary or medical or scientific or classical departments of the Georgetown university, have no legal or corporate existence; and for this further reason, that all persons claiming any such gifts or legacies attempted to be made to either are incapacitated to receive the same; that the same objections
170 exist with respect to the bequests in the will to certain alleged charitable associations within the District of Columbia. And the complainant insists that by reason of the invalidity of the several bequests and devises in the said will of the testator's property (other than his share in his father's estate) the limitation over after the failure of issue living at the death of Mrs. Speer and Mrs. Mosher attempted to be made by the testator, failed to accomplish a legal disposition of the said remainder interest in that portion of his property after the death of his said sisters, and therefore such remainder, (not derived from his father's estate), devolved upon the heirs at law of the testator: and that with reference to the several bequests and devises attempted to be made by him with respect to his share in his father's estate, by reason of similar illegalities and irregularities attending such bequests and devises, lapsed and fell into the residuary clause of the said will.

These interesting questions, which have been exhaustively argued by the able counsel in the case, arise out of the following state of facts:

Ethelbert Carroll Morgan, late of the District of Columbia, died testate on the 5th day of May, 1891, and his last will and testament, made and dated thirteen days prior to his death, was duly admitted to probate and record, and letters testamentary granted to William J. Stephenson and John Magruder, who qualified as executors; and thereafter said Stephenson died, leaving said Magruder surviving executor.

The testator was the son of James E. Morgan, of the District
171 of Columbia, who died on the 2nd day of June, 1889, testate, and his last will and testament, admitted to probate and record, was construed by this court in equity cause number 18,045, and decrees for the distribution of his estate were entered therein. James E. Morgan died seized and possessed of personal property and real estate; some of said real estate situate in the State of Maryland, but the greater portion in the District of Columbia. Ethelbert Carroll Morgan was a legatee in said will, and, under the decrees of distribution, his share in the personal estate of his father was paid over to John H. Magruder, surviving executor.

Ethelbert Carroll Morgan, in his said will, after making certain specific bequests, appointed William J. Stephenson and John H. Magruder trustees for all the rest of his estate to hold the same on certain uses and trusts in his will specified; and under decree of this court in equity cause No. 16,147 the defendants James Mosher and Michael J. Colbert were substituted as trustees under said will in place of John H. Magruder, who had resigned, and William J. Stephenson, who had died.

The testator died seized and possessed of both real and personal

property in the District of Columbia besides that derived from his father's estate. His real property, other than that which came to him from his father's estate, passed into the possession of Mosher and Colbert, substituted trustees as aforesaid; and his personal estate left in trust as aforesaid; other than that derived from his share of his father's estate, passed into the possession of John H. Magruder, surviving executor, and by him was paid over to the
172 said Mosher and Colbert, substituted trustees.

The real and personal property derived from the individual estate of Ethelbert Carroll Morgan as aforesaid, so held on April 1, 1900, by the said James Mosher and Michael J. Colbert, as substituted trustees, consisted of:

Real estate in Washington, D. C., assessed at.....	$5,800.
Personal estate.....	17,804.10
	$23,604.10

which said property is still in the hands of said substituted trustees, together with the income accrued thereon.

James Mosher and Michael J. Colbert as substituted trustees, received also the share of Ethelbert Carroll Morgan in the estate of his father, James E. Morgan, under the decree of distribution as aforesaid, and, on April 1, 1900 held in their possession the share or proceeds thereof as follows:

Real estate and proceeds of same in the District of Columbia.....	$25,327.33
Personal estate.....	27,477.83
Proceeds of Maryland real estate.....	1,786.76
	[illegible]591.92

which said property is still in the hands of said substituted trustees, besides the income accrued thereon.

Ethelbert Carroll Morgan died unmarried and childless, leaving as his next of kin and heirs at law two brothers, James D. and Cecil Morgan, and three sisters, Anna M. Mosher, Ada M. Hill and Eleanora D. Speer.

The will contains numerous clauses, giving legacies of money and specifics to relatives and friends; one of two copies of the portrait of his father to be presented "to the literary department," and
173 the other to "the medical department of Georgetown university." The remainder of the will is taken up with the disposition of the principal part of the two classes of his estates before referred to, which he deals with in separate paragraphs, and in different ways.

The complainants in their bill deny the validity of nine of the clauses of the will, designating them by letters ("*a*") to ("*i*"), which description will be retained for convenience in this opinion.

appear that if such faculty should be granted to Georgetown college (similar to that which formerly was granted by the briefs of Julius III in the year 1552, and of Pius IV in the year 1561,) in which it appeared, as was well known that in all colleges of that society wherein courses of philosophy and theology were adopted, great benefit accrued to religion; and especially when it should come to be known that the Georgetown college would be the only university in America with a learned doctorate, young ecclesiastics would flock to it, so that the courses of theology, which in their dioceses are slightly observed would then be properly performed.

"These things being stated by the reverend father in God, Castruccium Castracano, secretary of the Congregation de Propaganda Fide, to our Most Sacred Master Gregory XVI, with prayers, His Holiness benin*g*ly assented to confer the faculty of granting such degrees to the college of the city of Georgetown of the Society of Jesus.

185 Given at Rome, 30 of March, 1833."

On the 10th of March, 1844, eleven years later, Congress passed "An act to incorporate Georgetown college in the District of Columbia," by the name &c. of "The President and Directors of Georgetown College" by which name and title the six incorporators named were declared competent to take to themselves and their successors. for the use of the college, any estate whatever, in any messuage, &c., by gifts bequests, &c., and the same to grant &c, for the use of the college, in such manner &c., and to receive the rents &c. and to apply them for the use of the college; and by that name to sue and be sued &c., and generally by the same name to transact all business, &c., to adopt a common seal, under which all deeds and other acts of the college should be authenticated.

The seal on each of the catalogues filed in the record bears the same motto, which reads "*Sigèllum Georgiopolitam* 1789."

No subsequent legislation affecting the name of the corporation has been shown or discovered after careful search; and the branches of the college cirriculum spoken of in the catalogues and in the testimony as the schools of medicine and law; and in the will, as "the literary department of the university," appear to have owed their existence only to their establishment by the college authorities.

The reference in the historical statement in the college catalogue to the actions of the corporation of the Roman Catholic clergy-

186 men at Whitemarsh is explained by the provision of the act of the Maryland legislature of November session 1797, chapter 40, which recited that whereas in 1789 Messrs. Deakins and Threlkald had conveyed to John Carroll and others, certain lands upon an understanding that they should be a site for the erection of a college or seminary of learning under the government and control of the Roman Catholic clergy of the State; who had erected thereon spacious buildings and organized a seminary of learning; and that the said Threlkald in June 1796, to render the situation of the college more convenient and healthy, had conveyed an adjoining piece

of ground to John Carroll and others, who, in order to give perpetuity to said institution, had prayed the General Assembly that they might be enabled to convey said lands to the corporation of the Roman Catholic clergymen and their successors, as a body politic; therefore, Messrs. Carroll and others, by said act, were empowered to execute a deed of gift to said corporation of the Roman Catholic clergymen and their successors, appointed under the act of 1792; upon the execution of which the said corporation of the Roman Catholic clergy and their successors should be seized of said ground as fully as Carroll and his associates then were; and said property from thenceforth, and the rents, issues and profits thereof, should be under the sole control and management of said body politic and their successors, so as aforesaid appointed.

It must be conceded no legislative authority has been shown in this history creating a Georgetown institution of learning by the name of University of Georgetown or Georgetown University. In this country corporations are created by the authority of the legislature and not otherwise. 2 Kent, p. 276, 1 Thompson on Corporations, 336.

187 The act of Congress of March 1st, 1815, was in no sense a legislative act of incorporation, but if it could be supposed to be susceptible of such a scope, it would be much more reasonable to consider it as incorporating the institution by the name of the college of Georgetown, than by that of a university; for the allowance to the faculty to grant degrees to the students "to which persons are usually admitted in *other colleges or universities* of the United States" would be much more indicative of an intention to aid an institution which should continue to be known as a college (as is named by the title of the act) than to change its title to a university. It is evident the degree of Pope Gregory XVI in 1833 contains an incorrect recital when it states that the act of Congress of 1815 had already erected the college into a university. Besides, such a degree of an ecclesiastical authority, however deserving of respect from the coreligionists of the Pope, could have no force to incorporate a university or create any other corporation; a thing which can only be accomplished in this country through the legislative authority. About the time Georgetown college began to call itself a university, several other colleges had assumed the appellation of university, but this had been accomplished under special statutes; as in the case of Princeton college in 1896, and of Columbian college in this District at an earlier date, under the authority of an act of Congress.

188 As the Georgetown college received its only charter of incorporation by the name style and title of "The President and Directors of Georgetown College," and no other, *by which name and title* they and their successors were declared competent to take to themselves any property by gift, bequest, devise or will, and by that name to sue and be sued, and transact all business, &c. &c., it is plain, upon general principles, that no conveyance or bequest

could, under ordinary circumstances, invest them with title to any property unless it were made to them in their corporate name.

If the act of 1815 had already converted the college into a university, it is not easy to understand why the decretal of 1833 was deemed necessary to effect what had already been accomplished, or why the college should have made no public use of the title until in very recent years; or should, in 1844, have sought from Congress an act of incorporation of the institution by the name of a college; or should, under that name, have claimed the grant from the Government in March, 1833, of the lots in Washington city or in other ways have relied upon its collegiate title for half a century thereafter.

But the failure of the Georgetown college to obtain legislative authority to assume the new name would not necessarily be fatal to its claim to the benefactions by the will of Carroll Morgan, confided to what he called the Georgetown university.

It is perfectly well settled that "a misnomer in a grant by statute or by devise to a corporation does not avoid the grant, though the right name of the corporation be not used, provided the corporation really intended to be benefited is made apparent." In the
189 words of Chancellor Kent, (4 Kent. Com. 293) "The general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by, or to, a corporation, or a contract with it; and the modern cases show an increased liberality on this subject. For a corporation to attempt to set aside its own grant, by reason of misnomer in its own name, was severely censured, and in a great measure repressed, as early as the time of Lord Coke."

In 1 Redfield on Wills, ch. X, sec. 41, (609–10) (*a*) it is said: "It is never required that all the particulars of name or description of person or thing, should be precisely accurate, in order to the validity of the provisions of the will. It is always sufficient that the courts, after learning the surrounding facts and circumstances, should be able with reasonable certainty to declare the intent of the testator."

2 Underhill on Wills, p. 831.

The courts have gone great lengths, in many cases, in supplying by intendment defects in the description of corporations, both where some particulars of the corporate name were omitted, and where terms were introduced, not in the corporate name. Where a legacy was given to the Provost and Fellows of Queen's College, and the corporate name of the college was Provost and Scholars, it was held as in common parlance the name of Provost and Fellows was used instead of the proper corporate name of the college, and this be-
quest was for the benefit of the library, and the library was
190 held by the corporate body, that body must have been intended to take. (Queen's College *v.* Sutton, 12 Simons, 521. So in Bradshaw *vs.* Thompson, 2 Young & Collins' Chancery Cases

295, the Charing Cross hospital was held entitled to a legacy given to "the Westminster hospital, Charing Cross," as being nearest the locality mentioned and as being a general hospital, of which the testator had spoken. In Wilson *vs.* Squire, 1 Y. & C. C. C., 654, the devise was to "the London Orphan Society in the City Road;" as the only society in the locality approximating that name was the "Orphans' Working School, the court held the school was sufficiently described, and awarded the devise to it; although it appeared there was a society at Clepton called the Orphans' Working Asylum.

Numerous cases referred to in 7 Eng. Law & Evidence, at p. 638, sustain the position of the text in the article, that as a general rule, "the misnomer of a corporation has the same effect as the misnomer of an individual; and when the true name is necessarily to be collected from the instrument in which such misnomer occurs, or is shown by proper averments, a grant by deed to a corporation, or a contract with it, will not be invalidated thereby.

"As in grants to natural persons, a description which designates the person is sufficient, so in grants or obligations to or from a corporation, if it be named and described in such way as to identify and distinguish it in the common understanding of men from all others, the grant will be good."

"In case of a devise or legacy to a corporation, the description by name is sufficient, if there be enough to show there is such
191 an artificial being, and to distinguish it from all others, though there be a variance in the words and syllables used."

Thus in North Carolina Institute *vs.* Norwood, where a bequest of $6,000 was left to the Deaf and Dumb Institution, and no institution of that corporate name could be found, but one was found by the corporate name of "President and Directors of the North Carolina Institute for the Education of the Deaf and Dumb" which was popularly known by the former name, the court held it presented a case of latent ambiguity; and upon the identification of the later institution by extrinsic evidence as the legatee intended, it was held entitled to the bequest.

In Hospital *vs.* Knight, 11 Eng. L. & E. Rep., 191, a bequest of £500 to the "Westminster Asylum for Pregnant Women," was held, upon extrinsic evidence, as well as from the context of the will, without any inquiry a gift to the "General Lying-in Hospital."

In Vansant *vs.* Roberts, 3 Maryland, 119, the testator bequeathed the residue of his estate to "The Trustees of the Chartered Fund of the Methodist Episcopal Church located in Philadelphia, for the sole use and benefit of said church according to the character of the fund, forever." No corporation was found to correspond in name with that mentioned in the will; but the only corporation claiming the fund was one styled "The Chartered Fund of the Methodist Episcopal Church in the United States of America." Held, the corporation claiming manifestly was that intended by the testa-
192 tor, and that it should receive the legacy.

In 3 Pickering, 23, it was held that a devise to the North parish might be enjoyed by the inhabitants of the South parish.

It is also settled an old corporation may acquire a new name by reputation and usage. 7 Enc. Law & Evidence, 685. (2d edition.) In Angell & Ames on Corporations, page 79, it is said: "If a devise to a corporation (though the name be entirely mistaken) show that the testator could only mean a particular corporation it is sufficient."

The defendants insist they have sufficiently shown by the proof that these bequests were intended for the benefit of the Georgetown college, though the testator, misled by its usual designation "in common parlance" had used the misnomer of "Georgetown university" when speaking of the Georgetown college. Father Dougherty, the president of the college, testifies the popular name of the college, by which it is known in this community and throughout the United States *if* "Georgetown university" or "the university of Georgetown." The earliest catalogues filed being for 1889–90 and 1890–91 are entitled, on the front page, "A catalogue of the officers and students, Georgetown college, printed for the university." On the third page, the college is spoken of as "Georgetown university" created by act of Congress as a university in 1815; but the corporate title is said to be "The President &c. of Georgetown College." On page 8 commences "the list of the faculties, Georgetown university" and on the 12th page the testator is named in the list of professors of special branches as "professor of laryngology." The catalogues from 1898 to 1902 resemble those preceding, except that they
193 are all marked "Georgetown university" on the cover and title page.

This expression of the court of appeals in 3d Maryland 128, has an application to the facts before us: "In the present case, there is but one corporation claiming the bequest, and it is to be presumed that as the testator manifestly designed to leave his property to some incorporated institution, all those who could have set up any claim to it would have done so."

The authority of these and many other similar adjudged cases has a greatly increased force in the present instance, because of the provision in section 4 of the charter of Georgetown college, of 1844, that especially provides that "no misnomer of said corporation shall defeat or annul any gift, grant, devise or bequest to or for said corporation."

That the testator designed to give these several bequests and devises mentioned in connection with Georgetown university, for the benefit of the corporation of Georgetown college, with which he was so intimately connected, cannot be doubted; and the inquiry which might otherwise have resulted from the "misnomer of said corporation," intended to be guarded against by section 4 of the charter, should not be used to "defeat or annul" those "gifts, grants, devises and bequests to the said corporation."

On these considerations I overrule the objections based upon misnomer of the institution, and must regard the various benefactions to the "university" as though the words "Georgetown college" had been used instead, in each case.

194 *Second.* The next contention of the complainants is that the bequests and devises in Carroll Morgan's will, made within a month before his death, (which the court has decided devolved upon the Georgetown college notwithstanding the misnomer by which they were given to the university) are illegal and void for the further reason, that the college is conducted mainly for the inculcation of denominational religion by priests of the Order of the Jesuits, a religious society of priests and teachers; and that such dispositions are therefore within the prohibition of article 34 of the Maryland declaration of rights. It is conceded the institution was founded by the Jesuits and that the first contributions towards the establishment of the school in its incipiency and early growth, were derived from the "confidential trusts," held, "for pious purposes," "for the support and uses of ministers of the Roman Catholic religion;" and that under the Maryland Acts of 1792, chapter 55, and 1797, chapter 40, these funds were vested in the "corporation of the Roman Catholic clergymen," and furnished the "site for the erection of the college or seminary of learning" under the government and control of "the Roman Catholic clergy of the State."

As claimed in the catalogues, this was the first Catholic institution of higher learning founded in the United States, and was always under the government of the clergy of the church: originally of the Society of Jesus, in whose control it remained until they were suppressed by the brief of Clement XIV; that its government was restored to them about 1814, and it has remained under their charge up to the present time.

195 There is no reason to doubt that an important if not the chief purpose of the institution as first established and conducted was the education of young men in the theology of the Roman Catholic church. This plainly appears from the recital in the decretal of Gregory XVI. in 1833, that it had been represented by the general of the Jesuits that the college possessed no power to grant degrees to young men who were then being instructed in philosophy and theology therein, and that if the faculty to confer such degrees were granted by the Holy See, great benefit would accrue to religion, especially if the college, the only one in the United States publicly recognized as possessing a learned doctorate, should be endowed with the faculty of giving such degrees, it would in greater degree attract young ecclesiastics who might thus properly complete their courses in theology.

Under the conditions then existing it is clear that benefactions given to the institution as then conducted would have been as fully within the prohibition of the 34th article of the declaration of rights as though they had been bequeathed to any of the avowed theological institutions or divinity schools in the country. But in March, 1844, Congress in the grant of its first charter, ignoring whatever powers the school might have supposed it was already authorized to exercise, clothed the remodelled institution with defined powers and attributes, by incorporating it by the title of "The President and Directors of Georgetown College." It declared, in section 1, "There

should be erected in Georgetown a college for the instruction
youth *in the liberal arts and sciences.*" Neither of these pu
196 poses would ordinarily be supposed to embrace the facul
of instruction in *theology*, and no charter of a theologic
seminary, or divinity school would be accepted by its promote
which contained no more explicit recognition of the power to co
fer degrees for that particular branch of study. The term "liber
arts and sciences" is defined by Webster: "*The liberal arts:* t
higher arts, which among the Romans only freemen were permitte
to pursue, were, in the Middle Ages, these seven branches of lear
ing; grammar, logic, rhetoric, arithmetic, geometry, music a
astronomy. In modern times the *liberal arts* include the science
philosophy, history, and so forth; which compose the course
academical or collegiate education. The ancients reckoned th
same seven branches of learning as comprehended in the *liber*
sciences." Similar definitions are found in Worcester and in th
Encyclopedic Dictionary. Although theology may properly be i
cluded now in the word, "sciences," yet the expression, "liberal ar
and sciences" appears to have been used in a technical sense, ar
as such has been employed time our of mind, in charters to instit
tions of learning. Standing alone, it seems to be used rather in th
sense in which it is defined in Bailey's Etymological Dictionary i
1740,—"*Liberal arts and sciences*, such as are fit for gentlemen ar
scholars; as mechanick trades and handicrafts are for mean
people."

The authority of a college to grant degrees of bachelor and mast
of arts was clearly derivable from a faculty expressly given in i
charter to instruct youth in the liberal arts and sciences. Similarl
there should be shown a legislative grant by charter to conf
197 degrees of B. D. and D. D. upon ecclesiastics, expressly, or b
clear implication.

It must therefore have been under the supposed authority of th
Pope's decretal of 1833, that the Georgetown college assumed
grant twenty-seven times the degrees of D. D. between the yea
1817 and 1901, as shown on page 90 of the catalogue of 1900. Fo
as its only legislative charter of 1844 must have superseded al a
tecedent inferior authorizations to the institution, it became an
still remains the only law controlling the subject.

In section II it is provided that the rents and profits the corpor
tion was authorized to receive, should be applied, "*For the prop*
use and benefit of the said college;" and in section V, that the colle
shall not employ its funds or income, "for any other purpose
object other *than those expressed in the first section of the act.*" The
provisions undoubtedly appear rather as additional restrictions
the limited powers of instruction conferred by the first section, tha
as an enlargement of them.

It is not inappropriate to advert here to the provisions of the a
of 1797, chapter 40, in which similar care was exhibited to preve
the misapplication of the moneys of the college to unrestricted pu
poses of education. By its section 3 the Roman Catholic clergym

were authorized, in behalf of the college, to receive donations for the maintenance and education of thirty scholars, which by section 4 it was declared should be "applied faithfully to the purposes for which alone they were allowed to be received, and *not to any other uses of the corporation of the Roman Catholic clergymen*, which, when thereunto required, shall exhibit to the General Assembly
198 an account of all donations received by them for the maintenance of scholars and of uses to which they are applied."

Similarly, the act of Congress of March 2, 1833, provided that the proceeds of the sale of the lots thereby granted to the college should not be used otherwise than as "a capital to be forever invested; the dividends therefrom to be used and applied in aid of the revenues of the college, for the *establishment of such professorships therein as should be established, and to and for no other purposes whatever.*"

There is nothing, therefore, in the charter of the college, the law of its existence, nor in its history, which suggests its possession of powers of instructing students in matters ecclesiastical, or of applying its funds to subjects of instruction not described in section 1 under a reasonable construction of its charter. The general rule as to the propriety of a strict construction of the powers confided to corporations should particularly apply to charters of colleges, which ought pre-eminently to be restrained from a too liberal construction of their powers. "Where a right or privilege is claimed under the charter of a corporation, nothing is to be taken or conceded to it but what is given in unmistakeable terms, or by implication equally clear." Jackson *vs.* Hartwell, 8 Johnson, 423; Fertilizing Company *vs.* Hyde Park, 97 U. S. 659.

But, as we have seen, it was alleged in the bill that the bequests were really given for the support of a religious order or denomination, and that the college does conduct religious schools, regulated by the "charter granted by the Holy See in 1833," and, "under
199 the established rules and authority of the Society of Jesus," and that it otherwise acts in opposition to the 34th section of the declaration of rights. To these allegations the defendants were called to respond; and in the answers of Whitney and others claiming to be "The President and Directors of Georgetown College," they are all explicitly denied under oath; as they also are by Colbert, the substituted trustee.

In proof of these averments and to meet these denials the complainants adduced no other testimony than that of Father Dougherty, but rely greatly upon the documentary proof hereinbefore described.

It appears from these evidences that with few exceptions every teacher is a Jesuit, but nothing appears in the catalogue indicating the existence of a theological school as part of the college curriculum. The president testifies there had been "a course especially for theology, but they moved that away in 1869 to Woodstock, Maryland;" that it is looked upon as a portion of Georgetown, but has nothing to do with Georgetown's claims to give the different degrees. Georgetown claims the right to confer honorary degrees in theology; but they teach no theology at the school, and there is no theological de-

port and benefit of a religious sect, &c., but aver the corporation known as the President and Directors of Georgetown College is not a religious sect, &c., but is a body corporate created by act of Congress for educational purposes.

The answer contains a number of denials of the many averments of the bill, which need not be particularly noticed at this time.

The answer of Mr. Colbert, one of the substituted trustees, conforms generally to that of Messrs. Whitney and Mosher, as to the denials therein of the allegations of the bill. He admits the name "the University of Georgetown or Georgetown university" is not the correct corporate title of the institution referred to, but that the same is popularly known as Georgetown university, or the University of Georgetown; that the corporate name of the institution is "The President and Directors of Georgetown College" incorporated by act of Congress, and is generally known in the city of Washington, and generally throughout the United States as Georgetown university, or University of Georgetown or Georgetown college, and is the institution and no other that is named as beneficiary under the will of Ethelbert Carroll Morgan; and it denies that the limitation over to Georgetown university mentioned in the clauses of the will called "*b*," "*c*," "*d*," "*e*," "*f*," "*g*," and "*h*," or either of them is void, or that the other special legacies in the will to the university are void.

178 The answer of St. Vincent's Orphan Asylum declares such to be its corporate title, and that it is the same person as St. Vincent's Catholic Orphan Asylum referred to the will, and insists the legacy therein made by the latter name is valid.

In the same way, the Trustees of St. Joseph's Male Orphan Asylum answers that such is its corporate title, and that it is the same person referred to in the will as St. Joseph's Orphan Asylum, and that the legacy to it therein by the latter name is valid.

The answer of James Mosher, the other substituted trustee, consists of formal statements by way of admissions, except that he does not object to any of the legacies, devises and other dispositions of the will of James E. Morgan or Ethelbert Carroll Morgan, or to their being carried out so far as they are legal and valid, or capable of being carried out or given effect in law or in equity.

After replication, Father Dougherty, president of the Georgetown college, was examined on behalf of the complainant, and produced copies of the act of incorporation of the Georgetown college, approved June 10, 1844, and various other documents; catalogues, marked Exhibits B, C, D, E and F, from 1889 to 1901; and books of instruction referred to in his examination; with extracts from the journals of proceedings of the trustees of said institution. A deposition of Father Dougherty taken on behalf of the defendants was also filed. J, K, and L are copies of several religious books inculcating the doctrines of the Roman Catholic religion, which are used as books of instruction in the college.

179 The arguments in the case have been of very great ability and thoroughness, and have required and received careful consideration at the hands of the court.

First. The chief discussion has taken place with respect to the clauses of the bill designated as *a* and *b*, which undertake to dispose of the principal part of the testator's estate not *derived ex parte paterna;* and the clauses designa- as *c*, *d*, *e*, *f*, *g* and *h*, which undertake to dispose of the greater part of the testator's estate which was *derived ex parte parterna.*

It is contended by the complainants that the disposition of the remainder interest in the estate not derived *ex parte parterna*, and designated *h*, and those designated *c*, *g* and *h*, of the estate derived *ex parte parterna*, are void and should be decreed to be lapsed, and to belong to the next of kin and heirs at law, because there is no such corporation or corporate institution in the District of Columbia having the name of "Georgetown University" or "The Georgetown University of Georgetown."

In considering this objection, it became necessary to examine with all possible particularity the historical facts connected with the origin and incorporation of the institution claiming the benefit of these provisions in the will. Many of them are set forth in the testimony oral and documentary in the record. In addition to these sources the court has found some other incidents pertaining to its history which are of interest as completing the narrative.

In the introduction of the Catalogue of Georgetown University for 1899–1900" page 16 it is stated that the foundation of the
180 college was projected in 1785, and in the next year, "the incorporation of Roman Catholic clergymen in the chapter held at White Marsh, Md. adopted a series of resolves concerning the institution of a school" which it was ordered should be erected at Georgetown, Md., and appointed five directors of the enterprise, one of whom was the Rev. John Carroll, subsequently archbishop of Baltimore. In 1788, the first building was undertaken, though students were not received until 1791. "Upon the reorganization of the Society of Jesus, in Maryland, in 1805, the Georgetown college, as it had already begun to be called, was transferred to the fathers of that society, under whose control and direction the university still remains."

These dates are given somewhat differently in the testimony of Father Dougherty (Examiner's Record page 6) who says that previous to 1814 those in charge were not Jesuits—"You understand there were no Jesuits, legally, before that in this country."

The witness referred to the effect of the Bull of Clement XIV in 1773, which suppressed the Society of Jesuits in every state of Christendom. Jesuit priests had accompanied the first expedition sent out by Lord Baltimore to Maryland, and they and their successors had been performing the duties of their faith until the Bull of Clement XIV, better known as Gangamelli. At that date Father Carroll was studying his profession in Europe, but was obliged to return to Maryland. The exercise of the functions of all the members of the order was suspended until the issue of the Bull of Restoration by Pope Pius VII, 1814. It was doubtless because of the
181 unprotected condition of the clergy of that church during this period of suspension, that the legislature of Maryland in

November, 1792, passed the statute, chapter 55, which enacted that notwithstanding the declaration of rights forbidding gifts, sales and devises for the support of a religious sect, &c., without the leave of the legislature, yet if any person held any property which before 1776 had been committed to them in confidential or implied trust, for the support, &c., of ministers of the Roman Catholic religion, such person was thereby authorized to execute and record a declaration of such confidential trust; and the ministers of the church in whose favor such declaration had been made were thereby authorized to form a body politic or corporate, by a name to be selected by themselves and recorded, and thenceforth it should become vested of such property upon the terms of such confidential trusts, and manage the same, &c. It further appears, from the records of the general court, that the name assumed by the corporation thus authorized was "The Corporation of the Roman Catholic Clergymen."

The first instrument appearing in this history in the form of a legislative or other authoratative recognition of an institution of learning at Georgetown, was an act of Congress approved March 1, 1815, which reads as follows: "An act concerning the college of Georgetown in the District of Columbia: Be it enacted, &c. That it shall and may be lawful for such persons as now are or from time to time may be the President and Directors of the College of Georgetown, within the District of Columbia, to admit any of the students belonging to said college, or other persons meriting academical
182 honors, to any degree in the faculties, arts, sciences, and liberal professions, to which persons are usually admitted in other colleges or universities of the United States; and to issue in an appropriate form the diplomas or certificates which may be requisite to testify to the admission to such degrees."

On the 2nd of March, 1833, Congress passed "An act granting certain city lots to the President and Directors of the Georgetown College in the District of Columbia" which conferred a grant to the President and Directors of Georgetown College in the District of Columbia, of twenty lots in the city of Washington, which should be selected and valued by the commissioner of public buildings, when requested by the said president and directors; which "when so selected and valued, should be vested in the said corporation, to be held and disposed of by it in fee simple, for the best price, and the proceeds invested, and should not be otherwise used by the said president and directors than as a capital to be forever kept invested and the dividends accruing to be used and applied in aid of the revenues of the college, to the establishment of such professorships therein as now are or hereafter shall be established by them, and to and for no other purpose whatever."

No further step was made in its history in this direction until the 30th of March, 1833, when Pope Gregory XVI issued the following decree:

"*Decretum Sacrae Congregationis De Propaganda Fide.*

Cum R. P. Joannes Roothaan Societatis Jesu Praepositus Generalis supplicibus precibus ad Sanctissimum Dominum Nostrum Gregorium Div. Prov. P. P. XVI. datis exposuerit, ejusdem
183 Societatis Collegium Georgiopoli in America Septentrionali situm, per legem a Conventu Fooderatorum Statum, anno 1815, latam, fuisso in Universitatum erectum, in eoque juvenes Philorophicis et Theologicis disciplinis institui, quin tamen in so Gradus conferantur, quot corum conferendorum potestas a Sancta Sode nondum facta fuerit; insuper addiderit quod si Georgiopolitana Collegio ea facultas daretur ad illius instar, quae olim per Brovia Julii III, anno 1552 et Pii IV anno 1561 in quibus competebat omnibus ojusdem Societatis Collegiis in quibus Philosophiac et Theologiac cur sus rite absolvebantur, multa Religioni emolumenta obventura sod illud maxime quod Georgiopolitanum Collegium cumsit in Fooderatis Americae Statibus sola Universitas publicase agnita, spe Doctoratus illecti, qui in illis Regionibus maximi fit undique ad illud confluerent jevenes ecclesiastici, sicque cursum Theologiae, quem in corum Diocesibus leviter modo attingunt, rite absolverent; relatis per R. P. D. castruccium Castracano, Sacrae Congregationis de Propaganda Fide Secretarium, ad Sanctissimum Dominum Nostrum Gregorium PP. XVI Precibus, Sanctitas Sua benigna annuit, et facultatem Graduum conferendorum, facto prius de idoncitate promovendorum periculo, Collegio Georgiopoltana Societatis Jesu imperita est.

"Datum Romao ex Aed. dictae Sac. Congregationis die 30 Martii 1833.

"Gratis Sine ulla omnino solutione quocumque titulo.

"C. M. EPUS, *Praenest.* CAROLIS PEDICINI, *Praefectus.*

"Leco X Sigilli. C. CASTRACANO, *Secretarius.*"

Rendered into English, the substantial interpretation of this rescript would read as follows:—

184 *Decretal of the Sacred Congregation of the Propagation of the Faith.*

Inasmuch as the Reverend Father John Roottaan, general in chief of the Society of Jesus, by his suppliant petition, has explained to our Most Holy Master, by Divine Providence Pope Gregory XVI, that the college of the said society, situated in Georgetown in North America, by a law passed at a Congress of the Confederated States in the year 1815, had been erected into a university, in which young men are instructed in philosophy and theology, though nevertheless that degree cannot be conferred because power to confer it has not hitherto been given by the Holy See. Moreover, it being made to

ment of very clear words effecting their disherison, under the plain powers of the charter.

2 Underhill on Wills, p. 903, p. 1386.

The provisions as to the management of the money are in the highest degree uncertain. It is spoken of as an "endow-
211 ment," and as a "fund," and it is to be "used" and also "held." How much is to be *used* and how much to be *held?* In whose name are the funds and property to be held? And how are the archives and papers to be obtained? And what are to be considered as archives "having relation" to the colonial history? There is no power under the charter confided to the officials of the college to assume any such power, so foreign to their duty as instructors of youth in the liberal arts and sciences. I do not believe these delicate and extensive powers are transmissible in their character, and they are therefore not capable of performance by the substituted trustees, nor by the college authorities.

The trust is further invalid, as there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or non-feasance on the part of the college or of the substituted trustees.

The clause imposes a strict duty upon the two trustees named in the bill. To them, *nominatim*, and to their heirs and assigns is given full power to sell the property and re-invest the proceeds *in trust* nevertheless to pay the money *to the university*, and also *to see to the application* of the money thus paid, which is to be used and held as an endowment. Not only are the trustees to see to the investment of the principal of the fund and its re-investment, but as they are effectively to see to the application of the money, they necessarily must be also charged with the disbursement of the income, and of part of the principal also, if the archives to be purchased exceed in cost the income. To them also must be committed the direction of the character and extent of the researches, and of the archives and papers
212 which are to be obtained; if their duty "*to see* to the application" of the money is to be effectively performed. It thus appears the trust committed to them was one to a large extent personal and discretionary, involving the exercise of skill and judgment, confided to them, apparently, as a personal confidence, as is plainly done in other parts of the will; and therefore not of a character to be exercised by the successors in the trust. And yet, both those trustees are no longer connected with the trust, and Messrs. Mosher & Colbert have taken their places as substituted trustees; without any suggestion that they were at all acquainted with the personal wishes of the testator, or would ever have been selected by him to perform his wishes, to so great a degree hidden in his private thoughts.

That the prosecution of historical researches and obtaining and preservation of archives and papers relating thereto, would much more properly be within the function of an historical society, incorporated "for the purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particu-

lar and of American history generally," than of a college expressly limited by its charter to the instruction of youth in the liberal arts and sciences, would seem too plain for question; and yet the Supreme Court in 107 U. S., 189, Jones *vs.* Habersham, speaks with very serious doubt on the subject whether the Georgia historical society could exercise similar powers under a will, and it could say nothing stronger in answer to such doubt than to declare: "There
213 is *some ground for holding* that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents and works of art with other such books and works to be selected by the officers of the society and purchased out of the surplus income, and that the purposes of the trust are, in the words of Mr. Justice Story in Vidal *vs.* Girard, 2 Howard, 189, "germane to the objects of the incorporation," and relate to matters which will promote and aid and perfect these objects;" and the court contented itself with saying further that if any doubt remained of the capacity of the historical society to assume the trust, the equity court could appoint other trustees instead of the historical society. If such evident doubts should have beset the court with respect to the words of that devise and the capacity of the beneficiary there explicitly named, to assume a trust so much more germane to the functions of an important historical society, which kept a public library for the use of all comers, and whose charter expressed that it "shall be a public act, and shall be construed benignly and favorably for every beneficent purpose therein intended;" it is inconceivable that court could have found the provision before us to be "germane to the objects of the incorporation." Of what value would it be, hereafter, to insert in any charter of a college that its funds and income shall *not* be employed for any purpose or object other than those *expressed* in a particular section referred to, if provisions thus limited may be enlarged at pleasure; so that when thus changed they may read as though the will had
214 commanded the funds *should be used* and employed for *any project* that might appear tempting or profitable—whether it shall be the purchase and exploitation of some promising invention; or the fitting out of exploring expeditions to unknown lands; or embarking in any other adventure which it may be incorrectly pretended may promote instruction of students?

Sixth. Clause "*d*" of the will is preceded by the devise to his two trustees, with power of sale, &c., in trust nevertheless to pay and see to the application of:

"(Second) a sum not to exceed five thousand dollars, to be applied and expended under the personal supervision of my trustees, &c. This bequest seems to be obnoxious to almost all the objections made to it by the complainants.

1. The sum named is uncertain; the application of a sum "not to exceed five thousand dollars" would be complied with by expending any sum from one dollar of the total of that amount; and as the money is to be applied and expended under the personal supervisio n

of his trustees, who are to see to its application, they alone should have the right to decide upon the sum they are to expend. If the trustees should be called to account for improper application of funds under this clause, it could not be contended they had not the right to decide as to the proper amount to expend.

Courts cannot sustain bequests uncertain in their meaning, upon mere conjecture. Such a clause, uncertain in its interpretation as to quantity or amount, will be considered void, as uncertain, when neither upon the face of the will nor by the aid of admissible parole evidence can it be ascertained how much land or money the testator intended to give—as where land was directed to be given "at a price not to exceed $—" the clause was held void. So a
215 bequest that testator's mother and brother should have their maintenance and burying charges out of a fund was held inoperative. 25 Pennsylvania, 460, Kelley *v.* Kelley. In 9 Simons, 502, Jubber *vs.* Jubber, a provision that "a handsome gratuity shall be paid to each of my executors" was held void for uncertainty.

The manifest purpose of the testator that Stephenson and Magruder should be the individuals who should perform the several prescribed acts required of his trustees, is apparent in this clause, and the fact they no longer hold that position would render it doubtful, at least, whether the substituted trustees have the right to act in the place of those so named.

3. The uncertainty as to what the testator intended to provide respecting the bell, the altar, and the memorial window, renders it impossible to ascertain or carry out the clause before us.

The sum not to exceed five thousand dollars is to be applied and expended (1) to the purchase and erection of a chime of bells, and (2), either a side altar, or (3) a memorial window or (4) of a bell and (5) either a side altar, or (6) a memorial window for some one Catholic church, and to be designated by his mother by her last will or otherwise, and (7) if she fails so to do, he directs his trustees to carry out this trust as a memorial of his mother, Nora Morgan, and donate the same to some Catholic church, giving a preference, if there be one, built by the Jesuits.

Whether a chime of bells or a side altar; or a memorial win-
216 dow; or a bell; or a side altar or a memorial window for some Catholic church, is to be erected, in the alternative; or whether all or several of the articles named shall be erected is quite uncertain. As the mother is dead, there can be no designation by her will or otherwise.

4. The provision as to the memorial church to his mother is equally uncertain as to the church to receive the gift, and the whole clause is incapable of performance, especially since the disappearance of the original trustees.

In Fountain *vs.* Ravenal, 17 Howard, 389 the Supreme Court held the trust declared by the testator incapable of execution, inasmuch as the executors charged with the trust and appointed to carry it into execution had died; and that no administrator in succession could perform the duties; the court concludes that the testator, hav-

ing confidence in his executors, had substituted their judgment for his own; making no provision for failure by the death of the executors, and that without their action he did not intend to dispose of the residue, which he directed them to invest.

"Chancery cannot administer the trust. It was never sep-rated from the estate. It remains unaffected by the bequests, because the means through which it was given and applied have failed."

See 75 Maryland, 252—Gambell *vs.* Trippe.
62 Maryland, 503, Powles *vs.* Jordan.
95 New York, 76, Richards *vs.* Thompson.

In 3 M. and K., 237, Ray *vs.* Adams, where the power by a will is given to a trustee which he neglects to execute, the execution of the trust devolves upon the court. But if in the event which happened, the intended trustee dies before the time arrives for the ex-
217 ecution of the trust, and the trust therefore fails, the testator is to be considered as having, so far, died intestate.

This principle is well illustrated in the case 46th Maryland 179, The Provost of Dumfries, &c. *vs.* Abercrombie, which was as follows:

Robert Daniel bequeathed to the magistrates and town council of the burg of Dumfries the proceeds of his residence in Baltimore, in trust that they should permanently invest the same and should pay over the interest and dividends as they should be received, to the high school of Dumfries in such manner as might seem best to the trustees and most likely to promote the cause of education in said high school. A year before the testator died, an act of Parliament had transferred to the school board of the burg, without condition and absolutely, all the powers and authority connected with the high school which formerly belonged to the magistrate and town council; which was thenceforth superseded. Thus, when the will took effect, the council no longer had the power to receive or pay over the income.

In a suit to determine the right to the property devised, the court held that the various directions of the testator as to the standard of education were all matters which the testator had confided solely to the judgment and discretion of the trustees whom he had selected and appointed. "That at his death, the act of Parliament had deprived his trustees of all power, and substituted in their place, for the exercise of this discretion, a different body, composed of different individuals, elected in a different manner. That the vesting of this large discretion as to the distribution of his bounty *in these*
218 *trustees of his own choice*, is no immaterial and unimportant part of his will which a court can say the testator *intended* might be changed and may therefore be disregarded. So far from it, the substitution of the provisions of this act of Parliament in place of what the will directs in this respect, would, in our judgment, change what we must assume the testator considered an essential and important part of it, and it, in effect, made a new will for him."

And it concluded, as the change had become effective before the

death of the testator, his instructions were thereby made incapable of performance by the town council; / and it resulted the clause had become void; and the rights of the residuary legatees or next of kin vested immediately and irrevocably upon his death; that this incapacity of the trustees was insuperable and conclusive against the validity of the clause, and the difficulty was incapable of being removed by the court.

It is manifest it would have made no difference in the decision of the Maryland court whether the deprivation of the powers given the original trustees by the will had been destroyed by the effect of the act of Parliament, or by their voluntary resignation. The resignation in the case at bar as affectually deprived the original trustees of their power, as if an act of the legislature had undertaken to do so. Indeed, the resignation would have more certainly accomplished that end, as the power of a legislature in this country to interfere with the provisions of a trust is more than doubtful.

(Clause *e*.) The alternative direction (if the mother fails to
219 designate a Catholic church) directing his trustees to carry out the trust, as a memorial to his mother, and donate the same to some Catholic church, giving the preference to one built by the Jesuits, must be construed to be a gift for the benefit of the religious denomination named, and is in contravention of the 34th article of the declaration of rights.

In the case of Long *vs.* Gibbons, vol. 25, Washington Law Reporter, No. 4, this subject is examined at length by the equity court, and the rules applicable to it applied to the will then before it.

The gift to a Catholic church necessarily was a gift to a religious denomination with which that church was connected. In Baker *vs.* Fales, 16 Massachusetts, 495, the court decided that the grants to a church in Dedham necessarily were intended "for the purpose of supporting out of the proceeds a pastor or minister," "for supporting public worship and other religious purposes (for there is no other conceivable purpose for which a church can be supposed, without some express declaration, to be made the grantees of property." "The very term 'church' imports an organization for religious purposes, and property given to it, *eo nomine*, in the absence of all declarations of trust or use, must by necessary implication be intended to be given to furnish the purposes for which a church is instituted, the most prominent of which is the public worship of God."

Clause F. Following the clause E, the will says:

"In the event this clause and gift be void, I direct said
220 sum, not exceeding $5,000, shall be equally divided between St. Vincent's and St. Joseph's Catholic orphan asylums in the city of Washington."

The same difficulty attends this devise; that the sum to be divided is uncertain—not exceeding $5,000," which means any sum less than that amount. Although the names stated in the clause were incorrect, yet as the asylums meant by the testator are sufficiently evident, the misnomer in the title would not affect the gift; but under

the proof, they are within the operation of the 34th article of the declaration of rights, for they are undoubtedly so associated with the Roman Catholic church as to subject the bequest to the operation of the declaration of rights, and for that reason are void; as the testator postpone- the execution of his will just thirteen days too long.

The testator confessedly distrusted the validity of the entire clause of which this was the last provision; and the suggestion in this bequest shows that he had been warned of the probability that such would be the judgment of a court on the point.

Clause (*g*). Following the introduction, common to this and the previous two clauses, the present reads thus:

"Third. A sufficient sum, not to exceed $3,000, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown university; otherwise in some medical college in the District, to be known as the "E. Carroll Morgan scholarship"—(with a proviso as to the qualifications of the applicants for the place.)

Several of the objections already considered to the previous clauses are applicable to this provision.

221 1st. There is no definite sum named to be applied to furnish the income indicated.

2d. The trustees named are to pay and see to the application of an indefinite sum to be withdrawn from the residue of the estate, *ex parte paterna*, which is to furnish an income for a scholarship in the study of medicine in some college not named, to be selected by trustees, one of whom is dead, and the other resigned from the trust.

62 Maryland, 499 Powers *vs.* Jordan.
75 do. 252, Gambell *vs.* Trippe.

"Had the legacy been valid in the first instance, it would have lapsed because of the death of the trustee." That the person is to be selected for the scholarship, under this and the following clause, by competitive examination by the faculty of Georgetown university, adds additional uncertainty to the provision. Such examination is not one of the duties of the college officials under the charter; and the applicant least in need of the assistance may obtain the benefit of this provision.

Uncertainty pervades the clause in every feature.

It is well settled that where a gift to what may properly be called a charity is so indefinite as to be incapable of execution by a judicial decree, the representatives of the donor must prevail over the charity.

8 N. Y. 526, Williams *vs.* Williams.

This is especially the case where the gift is a mere benevolence or liberality.

29 New Jersey Equity, 46, Decamp *vs.* Dobbins.
95 New York. 82 Pritchard *vs.* Thompson.

222 Clause "*h*" is obnoxious to several of the objections made to it by the complainants.

The bequest is to his trustees "*to pay and see to the application* o the sum of five thousand dollars to form a fund known as the E Carroll Morgan fund or scholarship, to be applied as I may here after indicate to my trustees, and, if I fail, as my trustees with th advice of proper persons may decide, to the maintenance of a scien tific department or the foundation and application of the income t a scholarship in the classical department in the University of George town in the District of Columbia."

1. There is nothing to show the testator *ever did indicate to hi trustees* in any manner his wishes as to the application of the fund o scholarship to be formed.

In case of failure to do so, his trustees were "to take the advice o proper persons," as to the maintenance of one or other of the scien tific departments or scholarship referred to. It is clear the duties thus confided to his trustees were intended to be performed person ally by Messrs. Stephenson and Magruder, and not by other person to be appointed, if at all, after the death and resignation of thos two persons thus named. Of course the testator never could hav contemplated indicating verbally his wishes, to persons whose name he could not even guess at, when he made his will, and who could only come into existence as substituted trustees after the testator' death under the appointments of a court.

These substituted trustees are as completely undescribed by thi testator as are "*the proper persons*" upon whose advice he desire Stephenson and Magruder to determine what should be don
223 with the money. Being acquainted with those two he ha selected to take charge of his estate, he might be willing t trust to their discretion to select "proper persons;" but what guar antee could he have that other persons totally unknown to hi would act judiciously in making wise selections of proper privat persons equally unknown to him?

These provisions if they mean anything, under the new state o facts, practically allow the unknown substituted trustees and th unknown "proper persons" to make a will for the testator. In th Tilden will case, the testator at least had the advantage of knowin his executor personally; but the court refused to sustain the clause of a will which was to dispose of large properties in the manne agreeable to the wishes of the executor. It was quite enough tha Mr. Bigelow should be allowed to make *his own will*, without mak ing one for Mr. Tilden after he had died.

A clause which is in effect a mere authority to a third party t direct how a specified sum shall be disposed of is inoperative, an the sum named therein being a void bequest, falls into the residu of the estate.

53 Conn. 242, Bristol *vs.* Bristol.

Since these first provisions of the clause are void, whatever i given in the alternative, after the first named appears to be illega necessarily fails.

In 17 Rhode Island, 318, Kelly *vs.* Nicholls, a testator devise

property to designated persons in trust form a variety of ob-
224 jects—the care of the grounds of his estate; to keep his clock in repair, to entertain ministers of the orthodox Quaker faith to which he belonged in his house, and for similar purposes, all which the court held to be mere acts of liberality or benevolence, instead of charitable uses, and therefore void.

There followed a declaration of a trust which the court held to be valid in its character, viz., to re-publish certain writings of the early Friends. But as the previous gifts were void, the further provision as to publishing the books, though valid in its character, was connected with the void trusts; and the court, following many decisions in England and in this country, held the entire devise and legacies void. The court, after pointing out in detail the invalidity of the previous disposition, declares: "that these trusts are so controlling in their nature, so unascertainable in their scope, and so inseparable from the trust to publish religious books, that no part of the bequest can be enforced as a charity, and therefore that the whole is invalid."

In 6 Vos., 404, 410, Chapman *vs.* Brown, a gift of a sum in trust to erect a chapel, and if any surplus remains, then to pay it to A, was held void *in toto*, because the direction as regards the chapel was in contravention of the statute of mortmain, and this legacy failing, no *surplus* existed; as it could not be inquired into by the court how much the testator wished his trustees to expend for the chapel; which would be necessary in order to ascertain the amount of the probable surplus; which would be necessary in order to ascertain the amount of the probable surplus that the other legatee was to take.

225 2 Jacob & Walker 270, Attorney General *vs.* Hintman.
9 Vesey 535, Attorney General *vs.* Davies.
2 Underhill, section 906.

The effect of the residuary clause of the will, designated as "*i*," has been settled by the decree in equity cause 18,045; and according to this, the several bequests and devises of portions of the testator's estate *ex parte paterna*, attempted to be disposed of by clauses and sub-clauses "*c*," "*d*," "*e*," "*f*," "*g*" and "*h*," which have lapsed, because of their invalidity, must fall into the residuum, and pass under the residuary clause; while the property not derived *ex parte paterna* will pass under the clause designated "*a*" to the two sisters named therein, according to its provisions; and under clause designated "*b*" to The President and Directors of Georgetown College.

I will pass a decree to this effect, and for the accounting prayed for.

A. B. HAGNER,
Associate Justice.

May 20th, 1903.

partment; no distinction is made between the students as to admission to college or otherwise on account of differences in religion; that the attendance of students, not wishing to do so at religious lectures, is not insisted upon; nor at worship, by Protestants, except as matter of discipline; that the only course they teach in the college is the classical course; that if any non-Catholic would ob-
200 ject, he would not be compelled to take the catechism in class; that the Georgetown college is controlled by the Jesuits as Princeton is controlled by the Presbyterians, and Columbian university by the Baptists. From this abstract of the nature of the proofs it appears that besides the denials in the answers to the various allegations on the subject, there is testimony tending to support these denials, and to explain or contradict sundry conclusions drawn by the complainants from the documentary proof.

At this stage of the case, before the decision of the Supreme Court in the case of Bradfield *vs.* Roberts, Treasurer, 175 U. S. 296, it would have been incumbent upon courts to consider the weight of the respective charges and proofs; as had uniformly been done in the numerous cases where this subject had been presented for its decision.

16 Nevada, 373, Stile *vs.* Halleck.
18 Lawyers' Annotated Reports, 399.
37 Minn., 501, Coates *vs.* Campbell.
125 Ill., 591, County of Cook *vs.* Industrial School of South Dakota.
50 Louisiana Annual, State *ex rel.* Orr *vs.* City of New Orleans.
28 Pa. State, 23; Price *vs.* Maxwell.
69 Mo., 492, Boyer *vs.* Christian.

But in view of that decision, all question- as to the sufficiency of the proof must be laid aside, and the decision of the point placed upon other grounds.

In that case the complainant sought to enjoin the Treasurer of the United States from paying moneys out of the Treasury to the officials of Providence hospital in Washington city under an
201 appropriation for an extension of the building; upon the ground that the corporation was composed of members of a monastic order or sisterhood of the Roman Catholic church; that the title to the property was vested in the Sisters of Charity of Emmitsburg, Maryland; and was conducted under its auspices, and that because of its sectarian character the payment of the appropriation out of the Treasury of the United States to this corporation would be in support and aid of a religious society, in contravention of the provision of the Constitution of the United States which inhibits Congress from passing a law respecting the establishment of religion. The bill referred to the act of Congress incorporating the hospital, which granted it appropriate power to receive sick and invalid persons, but made no reference to religion or the religious faith of the incorporators. Not one of these averments of fact in the bill was denied by the defendants, but they were all admitted

by the demurrer interposed in behalf of the Treasurer. The Supreme Court said, "We are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown it was not;" "that the allegations in the bill do not change the legal character of the corporation or render it on that account a religious or sectarian body." The court continues: "Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic church and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. The
202 statute provides as to its property and makes no provision for its being held by any one other than itself. The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporations be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence. There is no alle-
203 gation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic church, but who nevertheless are managing the corporation according to the law under which it exists. The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but on the contrary those powers are to be exercised in favor of any one seeking the ministrations of that kind of an institution. All that can be said of that corporation itself is that it has been

incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to."

The court further says:

"The act of Congress shows there is nothing sectarian in the corporation, and the specific and limited object of its creation is the opening and keeping a hospital for the care of sick and invalid persons." In like manner, it may be said here, the specific and limited object of the creation of Georgetown college is expressed in its charter.

The opinion of the Supreme Court in Bradfield's case concludes with the remark that, "The right reserved therein to amend, alter or repeal, leaves full power to Congress to remedy any abuse of the charter privileges." A similar provision as to the power of repeal is found in the charter of Georgetown college.

The discrimination attempted by complainants' counsel be-
204 tween the Bradfield case and that before us does not prevent the application of the ruling therein to the present question. The differences pointed out between the clause of the Constitution of the United States and the article in the Maryland bill of rights, do not affect the principle upon which the decision of the Supreme Court appears to be based, which is that if the recipients of a charter on its face free from all infringements of constitutional safeguards with respect to matters of religion, should be alleged to be exercising its chartered privileges in opposition to such constitutional safeguards, the remedy for such infraction is with the Congress that granted the charter and not with the courts; and that neither allegations nor proofs of such infractions are examinable by the courts in such a proceeding. In view of the admissions by the demurrer of the charges in Bradfield *vs.* Roberts, a stronger case for inter-erence was presented there than appears in the present case, where the allegations are denied by the pleadings and proofs.

For these reasons I must overrule, as untenable, the objection by complainants to the benefactions to the college, so far as they are based alone upon the opposition to the article in the bill of rights.

Third. A further objection is made to the validity of all devises or bequests to the Georgetown university or University of Georgetown (in other words, to the Georgetown college) on the ground that the persons claiming as the president and directors of the college are not legal successors of the original incorporation, which it is alleged has long since been dissolved by the death and resignation of all its members.

205 It is attempted to maintain this objection by reference to the transcripts from the minutes of its board of trustees from the first meeting of the incorporators held the day after the approval of the charter, up to the September preceding the 2nd of October, 1901, the day of the demand by complainants' counsel upon the college authorities for their production. Nothing on the face of the minutes appears to show a cessation of the meetings of the board, or any unusual interval between the meetings, three of which were

held in 1901. At the last of these a new member was elected and a vacancy in the office of secretary filled by the choice of a successor.

The complainants in their brief (page 28) appear to concede the charter "has not absolutely lapsed, and the corporation dissolved." It is clear in view of the manner in which these objections are now presented, collaterally, the court could not sustain the objection, even if grave informalities were apparent in the proceedings. (3 Thompson on Corporations p. 652; 1 do. p. 531) As was said by the general term in Electric Company *vs.* Leiter, 19 D. C., 581: "A corporation does not become dissolved or cease to exist by failure to elect the trustees. In such cases, the franchise would only be suspended. A corporation can be dissolved and its existence wholly terminated only by extinguishment of the corporate franchise conferred by the State upon the body of the corporators, and so long as this franchise exists, the company continues to be a corporation in legal contemplation, and may sue or be sued in that capacity."

Morawitz on Private Corporations, sec. 1005.

206 When the fact of incorporation has been shown, the burden of showing a dissolution is thrown upon the other side, and this can only take place by a surrender of the shareholders, or through a forfeiture by the State in a suit for the purpose and there are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter; the one by *scire facias*, the other *quo warranto*.

9 Gill & Johnson, 425–6,
Regents of the University of Maryland *vs.* Williams.

So in Mackay, 273, First Baptist Church *vs.* B. & P. Railroad Company, it was held that delinquencies of the trustees of a corporation in respect of clerical requirements of the charter, do not deprive it of the right to maintain an action, where it has been exercising its functions for fourteen years. Whatever irregularities are suggested in the case at bar in the conduct of the board meetings of this corporation have continued for perhaps thrice that time.

Fourth. By the bequest designated as "*b*," upon the death of his two sisters without issue, the trustees are directed to deliver the remainder of the testator's estate not derived *ex parte paterna*, to the Georgetown university (*i. e.* to the Georgetown college) "to be an endowment in equal shares of the literary and medical departments thereof."

It is insisted this bequest was not to the university (or college) to do with as it should see fit, within the scope of its charter, but was confined to the specific objects or "departments" each of which is operated entirely outside of the charter; and those departments therefore, and not the college, are to be held the real beneficiaries.

207 There is certainly nothing to show that what the testator called the "literary" department of the college is operated

"outside of the charter." The testimony of Father Dougherty states the college teaches young men, directly, as in any other college, and the classical course is the only course they teach in the college (page 80). Although there is no literary department, *nomination*, set out in the catalogues, yet almost the entire course of studies specifically named therein would seem to be embraced by the term "literary" as contradistinguished from "scientific," or "mechanical," or "mathematical." The words "literary *department*," in view of the nomenclature observed in the catalogues, would more appropriately have been described as the literary *course* of the college; and as the half of the bequest was to aid in the support of this principal educational function of the college, that corporation was intended to receive the benefit of it. As was said in Queen's College *vs.* Sutton, 12 Simons, 521 (cited *supra;* in 1 Redfield, chapter 10, 609–10)—"This bequest was for the benefit of the library, and as the library is held by the corporate body, that body must have been intended to take." With respect to the moiety to be applied to an endowment of the medical department, similar considerations apply. It is clearly shown the property occupied by the medical school belongs to the Georgetown college; that although there were filed in 1886, under the general incorporation acts, articles of association to conduct a medical school to be called the Medical Department of Georgetown University, yet the proposed charter has lapsed and been surrendered by the former shareholders, and the operations of the school, now called the School of Medicine, are conducted altogether by the college authorities, the president of the college being *ex officio* the head of the school.

208

In Hanson *vs.* The Vestry of St. Mary's church, 79th Maryland, 436, where a devise was made to the vestry, the proceedings of which were to be applied to the maintenance of the parish school connected with the church, the court said it was shown by the general canons of the Protestant Episcopal church and by the testimony of the bishop, that the particular school was under the management of the rector, and was an integral part of the church organization; and it was obvious there could be no foundation for the contention that the testator had directed the vestry to execute a trust not germane to the object for which it was incorporated; and the validity of the devise was upheld.

See also 67th Maryland, 494, Eutaw Baptist Church *vs.* Schrively, 75 Maryland, 275, Halsey *vs.* The Convention of the Protestant Episcopal Church, and 91 Maryland, Prettyman *vs* Baker, where similar rulings were made. Even if it should be held that some amendment of the charter of the college was requisite to enable it to hold such bequests, yet a reasonable time would be allowed within which to effect the change before annulling the testator's purpose; or the authorities could create such professorships, as they might find needful in order to make the endowment available. For these reasons, I think the bequest in clause "*b*" is a valid disposition to the Georgetown college.

I will remark further, it may well be conceived that this bequest

for the benefit of the medical school was probably one of the
209 most cherished objects of the testator, who was a physician, and one of the instructors in the school.

Fifth. The next testamentary disposition to which objection is made by the complainants is that designated in the bill as "c." By this he leaves all his estate coming to him *ex parte paterna*, to two designated trustees, their heirs and assigns, with full power to sell, convey, mortgage, encumber and re-invest, *in trust* nevertheless to pay and see to the application of: First, the sum of ten thousand dollars to Georgetown university, &c., to be used and held as an endowment for the prosecution of research in the colonial history of Maryland, and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

I do not consider this as a valid devise or bequest to the Georgetown college, within the declared purposes for which alone it was incorporated, as "expressed" in the first section of its charter. Of the ten thousand dollars thus described no portion, under the natural construction of the clause, would be expended in the instruction of any youth in the "liberal arts and sciences;" nor does it appear that any student connected with the college would ever derive the slightest benefit from any results that might arise from the prosecution of the researches so vaguely referred to. There is nothing to show that any professor or other official of the college could claim any right to interfere in the management of the project; and if any such selection were to be made, the only effect of imposing the prosecution of the proposed research upon the college would
210 be to withdraw some of its teachers from the performance of their regular chartered duties. It is plain the college would have had no right to use its own regular revenues for the work of exploring remote history, or to obtain and preserve what it should acquire; no more could it properly use any benefactions it might receive from other sources for such foreign purposes. The 5th section of the charter declares the corporation shall not employ its *funds* or *income*, or any part thereof, for any purpose or object other than those *expressed* in the first section of the act (not "*signified*" or "*indicated*," but named with precision therein). 5 Thompson on Corporations, p. 5772; 2 Kent Com. 229, 240. This precaution is in sympathy with the other safeguards on this point elsewhere expressed by the charter, the law of its being. The proceeds of the lots given by the Government were required to be invested, and the dividends used to aid in the establishment of professorships, &c., and so of the moneys to be received under the authority of the act of 1797, chapter 45, from donations. The college would have no more authority, under its charter, to expend the ten thousand dollar fund for researches in colonial history than in researches into the history of any other time or country; and if the heirs-at-law are to be deprived of this part of what was their grandfather's estate in such explorations as are herein indicated, it should only be by the employ-

TUESDAY, *May 24th, A. D.* 1904.

MICHAEL J. COLBERT, Trustee, ET AL.
vs.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, ET AL.
vs.
JOHN D. WHITNEY ET AL. } No. 1369.

and

ELEANORA D. SPEER
vs.
JOHN D. WHITNEY ET AL. } No. 1370.

In pursuance of the agreement of counsel in the record, it is ordered by the court that the books and catalogues described and designated in the record as Exhibits J, K, L, B, C, D, E, and F, forming part of the record of the cause in the court below, be sent up to this court by the clerk of the supreme court of the District of Columbia, and that the same when received by the clerk of this court, shall be considered and taken as a part of the record in this court on the above stated appeals.

May 24, 1904.

We consent:

HAMILTON AND COLBERT,
Solicitors for Appellants in No. 1368.
MARION ERWIN &
O. J. WIMBERLY,
Solicitors for Parties Represented by Them.
CONWAY ROBINSON,
Sol'r for James Mosher, Substituted Trustee, and for Anna M. Mosher.

By the court:
Test:
HENRY W. HODGES, *Clerk.*

MICHAEL J. COLBERT, Trustee, ET AL., Appellants,
vs.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,
vs.
JOHN D. WHITNEY ET AL. } No. 1369.

ELEANORA D. SPEER, Appellant,
vs.
JOHN D. WHITNEY ET AL. } No. 1370.

On motion, counsel for appellants are allowed to file supplemental briefs herein, and counsel for appellees are allowed to file reply briefs.

The argument in the above entitled causes was commenced by Mr. O. J. Wimberly, attorney for the appellee in No. 1368 and for the appellant in No. 1370, and was continued by Mr. Conway Robinson, attorney for the appellant in No. 1369.

WEDNESDAY, *May 25th, A. D.* 1904.

MICHAEL J. COLBERT, Trustee, ET AL., Appellants,
vs.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,
vs.
JOHN D. WHITNEY ET AL. } No. 1369.

ELEANORA D. SPEER, Appellant,
vs.
JOHN D. WHITNEY ET AL. } No. 1370.

The argument in the above entitled causes was continued by Mr. M. J. Colbert, attorney for the appellants in No. 1368 and for the appellees in Nos. 1369 and 1370, and was concluded by Mr. Marion Erwin, attorney for the appellee in No. 1368 and for the appellant in No. 1370.

MICHAEL J. COLBERT, Trustee, ET AL., Appellants,
v.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, ET AL., Appellants,
v.
JOHN D. WHITNEY ET AL. } No. 1369.

ELEANORA D. SPEER, Appellant,
v.
JOHN D. WHITNEY ET AL. } No. 1370.

(Mr. Chief Justice ALVEY delivered the opinion of the court:)

The bill in this case was filed for the purpose of obtaining a judicial construction of the last will and testament of the late Ethelbert Carroll Morgan, deceased. The will was executed on the 22d day of April, 1891, and the testator died on the 5th day of May, 1891, thirteen days after the making of the will. By the will William J. Stephenson and John H. Magruder were appointed executors, and to whom, upon the admission of the will to probate, letters testamentary upon the estate of the deceased were duly granted. The testator left a considerable estate, both real and personal. He was never married, and he left as next of kin and heirs at law two brothers and three sisters, namely, James D. Morgan, Cecil Morgan, Eleanora D. Speer, Anna M. Mosher and Ada M. Hill. All his estate appears to have been disposed of, according to the terms of his will. Sometime after obtaining letters of administration upon the estate, William J. Stephenson died, leaving John H. Magruder the surviving executor, who proceeded with the administration of the estate.

The estate consisted of two parts,—the first being that which the testator had accumulated himself, and the second part being that which he derived under his father's will. His father, James E. Morgan of this District, died in June, 1889, testate, and leaving a considerable estate; and upon the settlement of which the share thereof to which his son, Ethelbert Carroll Morgan, was found to be entitled, under the will, amounted to near about fifty-five thousand dollars. That part of the testator's estate accumulated himself, independent of the part derived under his father's will, amounted to a sum near about twenty-four thousand dollars; the two parts of the estate of the testator so derived amounting together to about or a little over seventy-eight thousand dollars. These sums were paid into the hands of Magruder the surviving executor and trustee; and upon the resignation of Magruder as such surviving executor and trustee the funds and property in his hands were turned over to the hands and control of Michael J. Colbert and James Mosher who had been duly appointed substituted trustees under the will of said Ethelbert Carroll Morgan, deceased.

It was in this condition of the estate that the present bill was

filed, on the 5th day of March, 1901, by Eleanora D. Speer, in her own behalf, and by Emory Speer her husband and next friend, against the substituted trustees under the will of Ethelbert C. Morgan, deceased; James Mosher and Anna M. Mosher, his wife; St. Vincent's Orphan Asylum, the Trustees of St. Joseph's Male Orphan Asylum, and certain persons charged in the bill as representing themselves to be the President and Directors of Georgetown College, claiming in behalf of the college certain bequests in the will.

It is alleged in the bill, that the testator by his will, after giving and bequeathing certain specific and pecuniary legacies, in regard to which there is no question raised, made the following disposition of a certain part of his estate: "All the rest and residue of my estate, real, personal, and mixed of which I am now possessed or shall possess at my death (other than my share under my father's will, of which I would become possessed at my mother's death,) I give bequeath and devise to my trustees hereafter named, and their heirs and assigns, with full power to sell, convey, mortgage and reinvest; in trust, nevertheless, to apply the income and profits to the use and benefit of my sisters, Eleanora Speer, wife of Emory Speer, and Minnie Mosher, wife of James Mosher, in equal parts during their lives, and at their death to deliver and convey each sister's share to her issue, and if either sister die without issue living at her death, to deliver and convey said part to the survivor of her issue, if any surviving her.

"And if my said two sisters shall both die leaving no issue living at their death, I direct my said trustees to deliver and convey all the said rest and remainder of my estate (excepting my share aforesaid under my father's will) to Georgetown University, in the District of Columbia to be an endowment in equal shares of the literary and medical department thereof."

Then, after giving directions and making disposition as to his surgical instruments, his medical books, furniture in his office, and the rooms which had been occupied by him as an office, and also some articles in the possession of his mother, the testator proceeds to dispose of that part of his estate which he acquired under the will of his father, and to that end he incorporated the following devises and bequests in his will:—

"And I hereby give, bequeath and devise any and all the estate, real, personal and mixed, devised to me under my father's will, and to which I become entitled to have and possess upon my mother's death, to my trustees hereinafter named, their heirs and assigns forever, with full power to sell, convey, mortgage, encumber and reinvest, in trust, nevertheless, to pay and see to the application of—

"First, the sum of ten thousand ($10,000) dollars to Georgetown University, in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland, and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

"Second, a sum not to exceed five thousand ($5,000) dollars to be applied and expended under the personal supervision of my trustees to the purchase and erection of a chime of bells, and either a side altar or memorial window, or a bell, and either a side altar or a memorial window, for some one Catholic church * * * such church to be in the District, and to be designated by my mother by her last will or otherwise, and if she fails so to do, I direct my trustees to carry out this trust as a memorial of my mother, Nora Morgan; and donate the same to some Catholic church * * * giving a preference, if there be one built by the Jesuits. And in event this clause and gift be void, I direct said sum not exceeding ($5,000) five thousand dollars, shall be equally divided between 'St. Vincent's and St. Joseph's Catholic orphan asylums,' in the city of Washington.

"Third, a sufficient sum not to exceed three thousand ($3,000) dollars the income to be applied to maintain a scholarship, in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship.

"Fourth, the sum of five thousand ($5,000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship, to be applied as I may hereafter verbally indicate to my trustees, or, if I fail, as my trustees, with the advice of proper persons, may decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown, in the District of Columbia. That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia, and at the time or within a year a student in a Catholic or a public school of the District of Columbia, and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

"And lastly, as to all the rest and residue of my aforesaid share of my father's estate, my said trustees, their heirs and assigns, shall hold the same for the benefit of my aforesaid sisters Eleanora and Minnie, upon the same limitations, conditions, remainders, and powers, and in the same manner as the trustees under my father's will, will then hold, retain and possess the 'remainder' and bulk of the respective shares of my said sisters. I wish my brother Cecil to have my share of my father's library. I nominate and appoint William J. Stephenson and John H. Magruder my executors and trustees of this my last will and testament."

The contention upon which the bill is founded is that certain of the bequests contained in the will are void, and several grounds are assigned in support of the contention alleged in the bill. The first devise and bequest alleged to be void is that given by way of executory devise or bequest to Georgetown University, upon the death of the two sisters without issue living at the time of their death. The grounds alleged against the validity of this devise or bequest

are several. First, it is alleged and contended that there is no such incorporated institution, in the District of Columbia, capable of taking the bequest and devise, as the Georgetown University; and even upon the assumption that there is a mere misnomer, and that instead of Georgetown University the testator had in mind and intended the subjects of the devise and bequest to go to the president and directors of Georgetown College, still, this latter institution is alleged to be incapable of taking the devise and bequest because it is under the supervision and control of the order of Jesuits, and is therefore a sectarian institution. It is also alleged, that because of the misnomer or misdescription of the institution the devise and bequest over are void.

The next bequest assailed as void is that of $10,000 to Georgetown University, to be held and used as an endowment for the prosecution of researches in the colonial history of Maryland and the District of Columbia. The grounds urged for the impeachment of the validity of this bequest are the same as those urged against the validity of the preceding devise and bequest, with the additional ground that, upon the assumption that Georgetown College is the institution intended to take, there is no chartered power or authority in that institution to receive the bequest and to direct the prosecution of any such research into colonial history as that described; and therefore the bequest is void.

Then the bequest of $5,000 to be expended under the personal supervision of the trustees, in the purchase of a chime of bells, the erection of a side altar, and a memorial window, for some Catholic church, to be designated by his mother, is challenged as void for uncertainty, and because of the death of one and the resignation of the other of the trustees; and because of the death of the mother without designating the church to receive the memorials intended to be erected. And the alternative bequest of this $5,000 for the benefit of the two orphan asylums is also assailed as void, upon the ground that those institutions are under the charge and control of persons belonging to religious orders, and therefore incapable of taking the bequest under the facts of the case; and, upon the further ground, that the amount of the bequest is uncertain.

The two remaining bequests, the one of $3,000 and the other of $5,000, for the purpose of founding and maintaining scholarships, are also assailed as being void, because of their uncertainty and want of clearly defined conditions under which the funds should be applied.

It is charged in the bill that there is no such corporation in the District of Columbia as Georgetown University, or University of Georgetown, and therefore the bequests made to such institution are void and without effect, because of the want of a competent body to take such bequests for the uses and purposes mentioned in the will; and that the bequests made to and for the benefit of Georgetown University necessarily fail, and the funds intended to be applied under such bequests fall into and constitute a part of the residuum

of the estate of the testator, and pass under the residuary clause o the will.

The defendants answered the bill, and none of them conceded th claims and contentions set forth therein. Colbert, one of the substi tuted trustees, John D. Whitney and others, for and on behalf — the President and Directors of Georgetown College, the trustees of S Joseph's male orphan asylum, and St. Vincent's orphan asylum all controvert the claims and contentions set forth in the bill of com plaint, and insist upon the validity of the various bequests in thei behalf. The answer of Mosher, the other substituted trustee, simply expresses his willingness that the provisions of the will of the testa tor shall be given effect and carried out, so far as the same are, or i or may be legal or valid, or capable of being carried out and give effect to at law or in equity.

There was proof taken, and especially in regard to the name an coporate *status* of Georgetown College, claiming the devises and b quests made to and in behalf of Georgetown University.

The case was brought to hearing in the court below, and th learned justice who heard the case, upon very elaborate and learne examination of the various questions raised, held and decreed, tha the devise and bequest to the trustees named, of the testator's estat exclusive of that which came to him under the will of his fathe was valid and effectual, and that the devise and bequest over, upo the death of the two sisters without issue living at the time of thei death, to the president and directors of Georgetown College, in th District of Columbia, by the misnomer or mistaken name of Georg town University, is valid to pass said estate to said Georgetown Colleg for the uses and purposes mentioned in the will. And it was al held and decreed, that the clauses and sub-clauses in said will of th testator, designated in the bill of complaint and in the opinion of th court, as clauses *c, d, e, f, g, and h*, all of which relate to the esta acquired by the testator under his father's will, are, and each them is, void and of no effect, and that the bequests attempted to b made by said clauses and sub-clauses so designated, or to which sai sub-clauses are applicable, have lapsed and become inoperative; an futher, that all of said void and lapsed legacies, being bequests money, have fallen into the residuum of the estate of the said test tor Ethelbert Carroll Morgan, and become part of said residue, an have vested in the beneficiaries entitled to take under said residua clause of the will. The substituted trustees are decreed to accou for all the estate in their hands, in accordance with the terms of th decree.

It is from this decree that the present cross-appeals have bee taken. The first of these appeals is by Colbert, one of the substitute trustees, Whitney and others as the president and directors Georgetown College, St. Vincent's orphan asylum, and the truste of St. Joseph's male orphan asylum: the second appeal is by Jam Mosher, the other of the substituted trustees, and Anna M. Mosh his wife: and the third appeal is by Mrs. Eleanora D. Speer.

1. On these appeals, the first question is, whether there is any such incorporated institution in the District of Columbia as "Georgetown University" or "University of Georgetown," capable of taking the devises and bequests under the will, for the uses and purposes designated by the testator? Or if not, whether the institution of learning in said District incorporated by the name of the President and Directors of Georgetown College is the institution intended by the testator to take under the misnomer of Georgetown University? While it is conceded that there are several institutions of learning in this District which have been incorporated as universities, it is not averred or pretended that there is any such institution as "Georgetown University" in existence or operation in this District. Indeed, it is expressly alleged in the bill as a fact that there is no such incorporated institution as Georgetown University, though Georgetown College is frequently referred to and spoken of as Georgetown University, notwithstanding it has never been incorporated as such. It is simply a popular designation applied to the college. It is alleged in the bill that the defendants, Whitney and others, under the name of the President and Directors of Georgetown College, in this District, claim to be the beneficiaries entitled to the legacies mentioned in the will of the testator as for Georgetown University. It is not attempted to be shown that there was or is in existence in this District any such incorporated institution of learning as "Georgetown University," separate from and independent of Georgetown College.

We are referred to the Maryland acts of 1792, ch. 55, and of 1797, ch. 40; the first of which was passed to incorporate the Roman Catholic Clergymen of that State, and to enable them, in their corporate capacity, to acquire and hold and enjoy certain property intended for their use and benefit; and the second of which acts, being supplemental, was passed to confer upon the persons composing the corporation of the Roman Catholic Clergymen, certain powers with respect to property, and to authorize the pre-existing corporation created under the act of 1792, ch. 55, in behalf of the College of Georgetown, (for the first time referred to) to receive donations from persons charitably disposed. The College of Georgetown seems to have been a school established at Georgetown by the incorporated body of clergymen, but those acts of Maryland did not create or confer any corporate powers upon the school as such. It was simply a school established by the Jesuits, without corporate powers or franchises.

We are also referred to the act of Congress of March 1, 1815, ch. 70, entitled "An act concerning the College of Georgetown, in the District of Columbia." That act does not profess to be an act of incorporation of the college; but it conferred authority upon the President and Directors of the College of Georgetown, to exercise certain special franchises and faculties for the admission of students to academical honors, "to any decree in the faculties, arts, sciences, and liberal professions, to which persons are usually admitted in

226 *Appeal Bond of Michael J. Colbert et al. Filed June* 10, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, ETC., *vs.* JAMES MOSHER ET AL. } Equity. No. 22100.

Know all men by these presents: That we, Michael J. Colbert, trustee, John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker, Edward I. Devitt, St. Vincent's Orphan Asylum and the Trustees of St. Joseph's Male Orphan Asylum, as principals, and the American Bonding Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the above-named Eleanora D. Speer in the full sum of one thousand dollars ($1,000.00) to be paid to the said Eleanora D. Speer, her executors, administrators, successors and assigns.

To which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 9th day of June in the year of our Lord, one thousand nine hundred and three.

Whereas the above-named Michael J. Colbert, trustee, John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, Edward I. Devitt, St. Vincent's Orphan Asylum and the Trustees of St. Joseph's Male Orphan Asylum have prosecuted an appeal
227 to the Court of Appeals of the District of Columbia to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia,

Now, therefore, the condition of this obligation is such that if the above-named Michael J. Colbert, trustee, John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, Edward I. Devitt, St. Vincent's Orphan Asylum and the Trustees of St. Joseph's Male Orphan Asylum shall prosecute their said appeal to effect, and answer all damages and costs, if they shall fail, to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JOHN D. WHITNEY. [SEAL.]
ST. VINCENT'S FEMALE ORPHAN ASYLUM,
By D. J. STAFFORD, *President.* [SEAL.]
THE TRUSTEES OF ST. JOSEPH'S MALE ORPHAN ASYLUM,
By D. J. STAFFORD, *President.* [SEAL.]
JAMES B. BECKER. [SEAL.]
EDWARD I. DEVITT. [SEAL.]
MICHAEL J. COLBERT, *Trustee.* [SEAL.]
JAMES P. FAGAN. [SEAL.]
EDWARD McTAMANY. [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE,
By L. O. M. LASHMUTT, *Attorney in Fact.* [SEAL.]

Signed, sealed and delivered in the presence of *us:*
RICHARD J. WATKINS.

Approved the 10th day of June, 1903.

ASHLEY M. GOULD,
Justice Supreme Court District of Columbia.

228 *Memoranda.*

June 11, 1903.—Appeal bond of Eleanora D. Speer—filed.
June 11, 1903.—Appeal bond of James Mosher, substituted trustee, and Anna M. Mosher,—filed.

229 *Order Extending Time for Filing Record on Appeal. Filed July* 13, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER ET AL.
vs.
JAMES MOSHER ET AL. } Eq. No. 22100.

On motion of the defendants it is this 13th day of July 1903 ordered that the time for filing the record on appeal to the Court of Appeals, in the above entitled cause be and the same is hereby extended to September 1st 1903.

THOS. H. ANDERSON, *Justice.*

230 *Order Extending Time for Filing Record. Filed Aug.* 28, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER ET AL.
vs.
JAMES MOSHER ET AL. } Eq. No. 22100.

On motion of defendants it is this 28th day of August 1903 ordered that the time for filing their record on appeal to the Court of Appeals, in the above entitled cause be and the same is hereby extended to October 1st 1903.

JOB BARNARD, *Justice.*

231 *Stipulation of Counsel. Filed September* 14, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, Complainant,
vs.
JAMES MOSHER and MICHAEL J. COLBERT, Trustees, *et al.*, Defendants.
} In Equity. No. 22100.

Stipulation.

It is hereby stipulated and agreed as follows:—

First. That the clerk shall copy and include in the transcript of the record in this cause, on the appeals taken to the Court of Appeals of the District of Columbia the whole of the following designated parts of the record viz:—

1. Bill of complaint, filed M'ch 5, 1901.
2. Answer of Michael J. Colbert, filed June 11, 1901.
3. Answer of defendants Whitney *et al.* filed June 27, 1901.
4. Answer of the Trustees of St. Joseph's Male Orphan Asylum, filed Sept. 20, 1901.
5. Answer of the St. Vincent's Orphan Asylum, filed Sept. 20, 1901.
6. Answer of James Mosher, sub. trustee filed Oct. 8, 1901.
7. Decree of May 21, 1903.
8. Opinion by the court filed May 22, 1903.

232 Evidence on behalf of complainant.

9. The evidence and proceedings reported by the examiner and filed Sept. 19, 1902, including stipulations of counsel, and all exhibits except the catalogues which are marked for identification as Exhibits "B," "C," "D," "E," and "F," respectively, and except the books which are marked for identification as Exhibits "J," "K," and "L," respectively.
10. The stipulation of counsel filed November 17th, 1902, and the decrees therein mentioned and annexed thereto.

Evidence on behalf of defence.

11. The deposition on behalf of defendants reported by the examiner, and filed Sept. 19th, 1902.

Appeal.

12. The order allowing appeals and fixing amount of bonds, of May 21, 1903.

13. Appeal bond of appellants represented by M. J. Colbert, filed on the 10" day of June, 1903.

14. Memo. by clerk that on June 11, 1903, the appeal bond of Eleanora D. Speer, complainant herein, on appeal to the Court of Appeals of the District of Columbia, was duly approved and filed in this cause, and a further memo. by the clerk that on June 11 1903, the appeal bond of James Mosher, substituted trustee, defendant herein and Anna M. Mosher, defendant herein, on appeal to the Court of Appeals of the District of Columbia, was duly approved and filed in this cause.

Second. It is hereby further stipulated and agreed as follows:

233 1. That subpœna was duly issued M'ch 5, 1901 to and against all of said defendants, in accordance with the prayers of said bill;

2. That the marshal of the District of Columbia on April 2, 1901 duly made his return on said subpœna showing that the defendant Anna M. Mosher was not to be found in this District and that all the other defendants were duly served;

3. That on April 23, 1901 an order for service upon Anna M. Mosher by publication was duly passed by the court;

4. That on October 18th, 1901 due proof of publication as against said Anna M. Mosher, in accordance with said order was filed showing due publication and for the time required by law and the rules of court.

5. That on October 18th, 1901, a decree *pro confesso* against said Anna M. Mosher was duly passed and entered by the court;

6. That replications in due form were duly filed by the complainant to the answers of each and all of the defendants who answered said bill.

Third. It is hereby further stipulated and agreed:—That the original catalogues and original books which were filed September 19, 1902, as exhibits constituting part of the evidence reported by the examiner, and which are marked for identification as Exhibits "B," "C," "D," "E," "F," "J," "K," and "L," respectively, shall be sent up by said clerk to said Court of Appeals without being copied in the transcript of the record, and said originals shall there constitute and be a part of the record in said Court of Appeals, and

234 the same and any part or parts thereof may be referred to, used and relied upon with the same force and effect as if copied into said transcript; and it is agreed that if any order of said Court of Appeals or of the supreme court of the District of Columbia, should be necessary to effectuate this agreement, such order is hereby consented to.

It is further agreed that should this cause be appealed or taken from said Court of Appeals to the Supreme Court of the United States, the foregoing provisions of this stipulations shall be equally applicable to and effectual in that court.

Fourth. That the clerk shall copy and include this stipulation in said transcript of the record on said appeals.

August 1, 1903.

MARION ERWIN,
Complainant's Solicitor.
CONWAY ROBINSON,
Sol'r for James Mosher, Substituted Trustee, and for Anna M. Mosher.
HAMILTON & COLBERT,
Solicitor- for All the Other Defendants.

235 *Order Extending Time to File Record in Court of Appeals. Filed September* 30, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER, &C., vs. JAMES MOSHER ET AL. } Eq. No. 22100.

Upon motion of the defendants it is by the court this 30th day of September, A. D. 1903, ordered that the time for filing the transcript of record on appeal to the Court of Appeals of the District of Columbia in the above-entitled cause, be and the same is hereby extended to October 10, 1903, this extension to apply to all the parties appealing.

HARRY M. CLABAUGH,
Chief Justice.

236 *Order Further Extending Time in which to File Record.*

Filed October 9, 1903.

In the Supreme Court of the District of Columbia.

ELEANORA D. SPEER ET AL. vs JAMES MOSHER ET AL. } Equity. No. 22100.

On motion of the defendants, it is by the court this 9th day of October, A. D. 1903, ordered that the time for filing the record on appeals to the Court of Appeals of the District of Columbia, be and the same is hereby extended to October 16, 1903, for all the parties appealing.

JOB BARNARD, *Justice.*

237 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 236, inclusive, to be a true and correct transcript of the record, as per stipulation of counsel herein filed, copy of which is made part of this record, in cause No. 22,100, equity, wherein Eleanora D. Speer in her own behalf, and by Emory Speer her husband and next friend, is complainant, and James Mosher *et al.*, are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13 day of October, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1368. Michael J. Colbert, trustee, *et al.*, appellants, *vs.* Eleanora D. Speer. No. 1369. James Mosher, substituted trustee, *et al.*, *vs.* John D. Whitney *et al.* And No. 1370. Eleanora D. Speer, appellant, *vs.* John D. Whitney *et al.* Court of Appeals, District of Columbia. Filed Oct. 14, 1903. Robert Willett, clerk.

the gathering together the archives and documents relating thereto, would be the subject of great public interest, and particularly valuable to the future historians of the country. And that being so, there can be no reason for questioning the validity of the bequest upon the ground that there is no charitable utility to be derived from its execution; nor is there any such uncertainty in the manner of execution as to render the bequest void.

The authorities would seem to be plain upon this subject, and to fully meet the objections taken to the validity of this particular bequest. It is settled, that if a testator creates a trust for a particular charitable purpose, as for a school, hospital, almshouse, church, or other institution, and points out all the duties, so that there is certainty in the purposes and objects of the charity, and appoints no trustee, or if the trustees appointed fail for any reason, courts will appoint other trustees; for such is the plain intention of the testator; and it is a maxim of courts of equity never to allow a certain and valid trust to fail for want of a trustee. In such case, the courts say that there is no ground to suppose that the discretion of any particular trustee has anything to do with the essence of the gift. *Inglis v. Sailors' Snug Harbour*, 3 Pet. 99; 2 *Perry on Trusts*, 731. Other authorities might be cited to the same effect. If the power given to the first trustees is a *personal trust and confidence*, the court should not appoint other trustees to exercise that power, contrary to the intention of the testator; but the court ought to act upon liberal principles of construction in finding such intention. *Lorings v. Marsh*, 6 Wall. 337; *Att'y Gen. v. Gladstone*, 13 Sim. 7.

4. We come next to the bequest of a sum not to exceed $5,000, to be expended *under the personal supervision of the trustees* appointed by the testator, in the purchase and erection of a chime of bells, the erection of an altar, or memorial window, etc., for some one Catholic church * * * said church to be in the District of Columbia and to be designated by my mother by her last will or otherwise and if she fail so to do, the testator directs his trustees to carry out said trust, as a memorial of his mother, and donate the same to some Catholic church, giving preference, if there be one, built by the Jesuits.

This bequest, we think is void. It has several elements of uncertainty in it which no rule of construction can obviate or remove. In the first place, no particular church is named, or so described as to be identified with certainty. Moreover, the mother has died without naming any particular church to receive the memorial bequests. These particulars in which there is uncertainty are sufficient to render the bequest void, without reference to the other circumstances relied on for declaring the bequest invalid.

5. But the alternative bequest of this sum of $5,000 stands upon a different footing. Apprehending that the first bequest of this $5,000 might be declared void, the testator, in that event, says: "I direct said sum not exceeding $5,000 shall be *equally* divided between St. Vincent's and St. Joseph's Catholic orphan asylums, in the city

Washington." These asylums are incorporated institutions; the first by the name of St. Vincent's orphan asylum, and the second by the name of the trustees of St. Joseph's male orphan asylum, in the city of Washington. There is no serious question made as to the identity of these incorporated asylums, in the city of Washington, which have been made defendants and have answered the bill, as being those described in the testator's will. The slight variance in their corporate names as given in the will from their proper corporate names as stated in the bill and answers, is wholly immaterial. There is nothing to mislead in regard to their identity. But the objection taken to the validity of the bequest to these asylums, and which has been seriously urged, is that there is such uncertainty in the amount bequeathed as to render it impossible to execute the bequests. But in this contention we do not concur. The bequest is of the said sum not exceeding $5,000, *to be equally divided* between the two institutions. There is nothing else to be done than to make the division and pay over the bequest, and that is of $5,000, to be divided into two equal parts. It is argued that the trustees might, in the exercise of their discretion, make division of a less sum than $5,000. But of what sum could they make such division, keeping in mind the intention of the testator? The words "not exceeding" would seem to have been used without any special intention of qualifying or limiting the sum bequeathed and directed *to be equally divided;* these latter terms, we think, plainly indicating the intention of the testator to give the half of the $5,000 to each of the two institutions. To hold otherwise would necessitate the holding of the entire bequest void. This would be justified upon no established principle of construction. The intention of the testator should be given effect if possible. As said by the Supreme Court of the United States, in *Inglis v. The Trustees of Snug Harbor*, 3 Pet. 117, "a devise is never construed absolutely void for uncertainty, but from necessity; if it be possible to reduce it to certainty it is good. That the general intent must be carried into effect, even if it is at the expense of the particular intent." The general intent in this bequest was, manifestly, to give the $5,000, and hence he named no other sum,—a thing we must suppose he would have done, if he had intended a less sum to be equally divided between the two charitable objects.

We think it clear, therefore, there is no ground for declaring this bequest void.

6. The next question relates to the bequest to found a scholarship, and which directs that a sufficient sum, not to exceed $3,000, the income of which to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University, (college), otherwise in some medical college in this District, to be known as the E. Carroll Morgan scholarship.

This bequest is alleged to be void, because of the uncertain amount directed to be expended, and because of the discretion reposed in the trustees in the selection of the particular college in connection

with which the scholarship should be maintained. We think, how ever, the bequest is good, and that it can be executed under the d rection of the court. There is no foundation for the objection th the bequest is invalid for the want of certainty as to the amount d rected to be expended. The scholarship is directed to be institute and maintained from the income of an amount not to exceed $3,00 If the object in view should require the full amount of $3,000 to b expended, that amount will be applied; but if the object can b accomplished for less only so much as may be required will be a plied. There is, therefore, no such uncertainty as to the amount be applied for the object in view as will affect the validity of th bequest. And as to the question of discretion to be exercised by th trustees in selecting the college with which to connect the schola ship, there is no real difficulty. In the first place, the testator hin self has made his own selection by expressing his preference fo Georgetown College; but if, for any reason, that selection cannot b made available, then some other medical college can be selected b his trustees. In authorizing such selection there is nothing i the terms of the authority conferred to show that it was the inte tion of the testator to repose special personal trust and confidence i the trustees in the performance of the duty; and therefore to pr clude the exercise of the discretion by any succeeding trustees. Th authorities would seem to have settled the principle that where a estate is given to trustees to be applied to charity generally, or such charitable purposes and institutions as they in their discretio shall judge best, and the trustees die before the testator or make n selection of the objects or application of the fund, or decline to ac the court will be governed by the intent of the testator, to be gath ered from the interpretation of the whole instrument, in determi ing the question whether it can appoint new trustees to exercise th power and discretion given to the trustees named in the will: an if upon such construction it be found that new trustees may reaso ably perform such duty they will be appointed with directions proceed in the execution of the bequest. *Att'y Gen. v. Gleg*, 1 Atk 356; *Att'y Gen. v. Fletcher*, 5 L. J. (N. S.) ch. 75; 2 Perry on Trus sec. 721. We can perceive no good reason why the bequest for th institution and maintenance of a scholarship in the name of the te tator himself may not be executed by trustees appointed by the cou

7. The only other bequest impeached for invalidity is that by whi the trustees are directed to pay and see to the application of the su of $5,000 to form a fund to be known as the E. Carroll Morgan fun or scholarship, to be applied "as I (the testator) may hereafter ve bally indicate to my trustees, or, if I fail, as my trustees with th advice of proper persons may decide, to the maintenance of a scie tific department, or the foundation and the application of the i come to a scholarship in the classical department, in the Unive sity of Georgetown," etc.

This bequest or direction has in it so much uncertainty and wa of completeness, that it would seem to be impossible to execute it

directed, by any fair construction. The testator reserved to himself the right to control the trustees in the application of the fund by verbal direction. There was no such verbal direction given, and the alternative provided for, that of the trustees deciding with the advice of proper persons, is equally indefinite and uncertain, as it would be impossible for the court to determine who would be the proper persons to advise the trustees.

This bequest or direction falls within the principle of a large class of cases, wherein it has been held that the bequests were void for uncertainty and incompleteness. As, for instance, where the bequest was to such persons in trust as shall be named thereafter, and none are named; or where a fund is given for such charitable uses as shall be directed by a codicil or note in writing, and there are no such papers to be found; or where a trust is created in a will for a school to be thereafter named, and none is named; or to such uses as the executor shall appoint, and the executor's appointment is revoked, or the executor renounces probate or refuses to appoint, or where a bequest is made to trustees who decline to accept and exercise the discretion, and there is no authority in the successors to exercise the power; or where the sums or charities are wholly uncertain and indefinite—in all such cases, and cases depending upon similar reasons, the courts in this country are powerless to interfere to establish the charities, appoint trustees, or decree a scheme by which the fund can be expended. The cases illustrative of this particular principle will be found collated in section 729 of 2 Perry on Trusts, page 359.

It follows, therefore, that this bequest and direction is void, because of the want of certainty, and the absence of the conditions prescribed upon which the bequest could be executed. And such being the result upon the construction of the bequest, the fund must fall into and form part of the residue of the testator's estate, and pass under the residuary clause of his will.

Upon review of the whole case it results, that the decree of the court below must be reversed, and that the cause be remanded that an account be taken and such other proceedings be had therein as may conform to the foregoing opinion. The cost of the several appeals to be paid out of the residuary fund.

Decree reversed and cause remanded.

WEDNESDAY, *October 12th, A. D.* 1904.

MICHAEL J. COLBERT, Trustee; JOHN D. WHITNEY, James P. Fagan, Edward McTamany, James B. Becker, Edward I. Devitt, St. Vincent's Orphan Asylum, and The Trustees of St. Joseph's Male Orphan Asylum, Appellants,
vs.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,
vs.
JOHN D. WHITNEY, JAMES P. FAGAN, EDWARD McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College; Michael J. Colbert, Substituted Trustee, and All Parties to This Suit Interested Adversely to James Mosher, Substituted Trustee, or to Anna M. Mosher, or to Both of Them, } No. 1369.

and

ELEANORA D. SPEER, Appellant,
vs.
JOHN D. WHITNEY, JAMES P. FAGAN, EDWARD McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College; Michael J. Colbert, Substituted Trustee, and James Mosher, Substituted Trustee, and All Parties to This Suit Interested Adversely to Eleanora D. Speer. } No. 1370, Octob Term, 1904.

Appeals from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the reco from the supreme court of the District of Columbia, on separate a peals and was argued by counsel. On consideration whereof, it now here ordered, adjudged, and decreed by this court that the dec of the said supreme court in this cause be, and the same is hereb reversed; and that this cause be, and the same is hereby remand to the said supreme court that an account be taken and such oth proceedings be had therein as may conform to the opinion of th court. The costs of the several appeals to be paid out of the res uary fund.

Per MR. CHIEF JUSTICE ALVEY.

October 12, 1904.

In the Court of Appeals of the District of Columbia, October Term, 1904.

MICHAEL J. COLBERT, Trustee, ET AL., Appellants,
vs.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,
vs.
JOHN D. WHITNEY ET AL. } No. 1369.

ELEANORA D. SPEER, &c., Appellant,
vs.
JOHN D. WHITNEY ET AL. } No. 1370.

Stipulation.

(1.) Whereas Eleanora D. Speer in her own behalf and by Emory Speer, her husband and next friend, James Mosher, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, are appealing from the decree of the Court of Appeals of the District of Columbia passed on the 12th day of October, 1904, in said appeal cause numbered 1368 and cross appeal causes numbered 1369 and 1370, to the Supreme Court of the United States; and whereas Michael J. Colbert one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker and Edward I. Devitt, sued as representing themselves to *the* the President and Directors of Georgetown College, Saint Vincent's Orphan Asylum, and the Trustees of St. Joseph's Male Orphan Asylum, have received due notice thereof, they hereby decline to join in said appeal as appellants, and this stipulation shall have the full force and effect of regular summons and severance.

(2.) That an appeal bond in the usual form by said appellants with the United States Fidelity & Guaranty Company as surety, in the penal sum of one hundred dollars ($100) to operate as supersedeas is consented to as sufficient for that purpose.

(3.) That copies of the assignments of error made by each of the respective solicitors in their briefs on said appeal and cross-appeals from the supreme court of the District of Columbia,—Nos. 1368, 1369 and 1370, which are attached to this stipulation shall be sent

up by the clerk in the record to the Supreme Court of the Unit States.

HAMILTON & COLBERT,

Solicitors for John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, Edward I. Devitt, Sued as Representing Themselves to be the President and Directors of Georgetown College; St. Vincent's Orphan Asylum, the Trustees of St. Joseph's Male Orphan Asylum, and Michael J. Colbert, Substituted Trustee as Aforesaid.

MARION ERWIN,

Solicitor for Eleanora D. Speer.

CONWAY ROBINSON,

Solicitor for James Mosher, Substituted Trustee, and Anna M. Mosher.

Assignment of Errors on Appeal of Michael J. Colbert, Trustee, et from Supreme Court of District of Columbia to Court of Appe D. C. in Appeal No. 1368.

Court of Appeals, District of Columbia, October Term, 1903.

MICHAEL J. COLBERT, Trustee, ET AL., Appellants,
vs.
ELEANORA D. SPEER. } No. 1368.

Assignment of Errors.

1. The court below erred in its decree of May 21, 1903, in holdi that the clauses and subclauses of Ethelbert Carroll Morgan's wi designated in the bill of complaint as clauses C, D, E, F, G, and were each and all of them void and invalid and of no effect.

2. The court below erred in its said decree in holding that all said legacies and bequests contained in said clauses designated C, E, F, G, and H lapsed and fell into the residuum of the estate Ethelbert Carroll Morgan and passed to the beneficiaries under t terms of the residual clause of his will, designated in the bill complaint as clause I.

G. E. HAMILTON,
M. J. COLBERT,
Solicitors for Appellants in No. 1368.

Assignment of Errors on Appeal of Eleanora D. Speer from Supreme Court of District of Columbia to Court of Appeals D. C. in Cross-appeal No. 1370.

In the Circuit Court of Appeals of the District of Columbia, October Term, 1903.

ELEANORA D. SPEER, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend, Appellant, *vs.* JAMES D. WHITNEY ET AL., Representing Themselves to be the President and Directors of Georgetown College, Appellees.	Appeal from the Decree of the Supreme Court of the District of Columbia.

Assignment of Errors.

Eleanora D. Speer in her own behalf and by Emory Speer, her husband and next friend (complainant in the court below), having taken an appeal to the circuit court of appeals of the District of Columbia, from the decree of the supreme court of the District of Columbia, entered in the above entitled cause on the 21st day of May, A. D. 1903, now defines the part of said decree appealed from, for the purpose of making assignments of error thereon as follows:

The court in said decree of May 21, 1903, and in the opinion of the court filed, and made a part thereof by reference thereto, in construing the said last will and testament of Ethelbert Carroll Morgan, and determining the devisees and legatees entitled to take thereunder, found and decreed in the paragraph of said will numbered second as follows:

"Second. That if his testator's said two sisters (Eleanora D. Speer and Anna M. Mosher) shall both die leaving no issue living at their deaths, then said substituted trustees shall under said sub-clause '*b*' (referring to the sub-clause of the will so designated in the bill of complaint, and in the opinion of the court), deliver and convey all the property and estate to which said sub-clause '*b*' is applicable to the President and Directors of Georgetown College in the District of Columbia (meaning the corporation chartered under the name of 'The President and Directors of Georgetown College' by act of Congress of June 10, 1844), to be an endowment in equal shares of the literary and medical schools connected with said college; and said President and Directors of Georgetown College are entitled to receive the same."

And appellant says in so finding and decreeing in paragraph numbered "second" in said decree the court erred, and appellant makes the following specifications and assignments of error thereon.

other colleges or institutions of the United States; and to issue, in an appropriate form, the diplomas or certificates, which may be requisite to testify the admission to such degree." This is all that was provided for by that act. It deals with the college as an existing institution, but not with an incorporated college.

Nor did the decretal of the Sacred Congregation of the Propagation of the Faith, issued by the authority of the Pope, in 1833, appearing in the record, have any effect or operation whatever, in clothing the college with corporate powers and franchises; nor did it invest the college with the attributes of an university. It appears to have been intended as a spiritual encouragement to the study of theology; it could have had no other effect or operation whatever, even if intended to confer academic faculties upon the college. Such faculties could only be conferred upon the college by act of Congress, at the time of the issue of the decretal.

In the view we have of this case, the acts of Maryland of 1792, ch. 55, and the act of 1797, ch. 40; and the act of Congress of 1815, ch. 70, to which we have been referred, have no other bearing or materiality upon the case than to show the origin and growth of Georgetown College, and to identify the early foundation of the school with the President and Directors of Georgetown College, as that institution was fully and completely incorporated by the act of Congress of June 10, 1844, (6 St. at L. p. 913) entitled "An act to incorporate Georgetown College, in the District of Columbia." That act is as follows:—

"SECTION 1. That there be erected in Georgetown, in the District of Columbia, a college for the instruction of youth in the liberal arts and sciences, the name, style, and title of which shall be 'The President and Directors of Georgetown College.'

"SEC. 2. That James Ryder, Thomas Lilly, Samuel Barber, James Curley and Anthony Rey, be, and they are hereby declared to be a body politic and corporate, with perpetual succession in deed or in law, to all intents and purposes whatsoever, by the name, style, and title of 'The President and Directors of Georgetown College,' by which name and title they, and their successors, shall be competent, at law and in equity, to take to themselves and their successors, for the use of said college, any estate whatever, in any messuages, etc., goods, chattels, and other effects, etc., by gift, bequest, devise, etc., and the same to grant, etc., for the use of said college in such manner, etc., and to receive the same, their rents, etc., and to apply the same for the proper use and benefit of the said college; and by the same name to sue and be sued, implead, and to be impleaded, in any court of law or equity, in all manner of suits, actions, and proceedings whatever, and generally by and in the same name, to do and transact all and every the business touching or concerning the premises, etc.

"SEC. 3. That the said corporation shall adopt a common seal, under and by which all deeds, diplomas, and acts of the said college

or corporation shall pass and be authenticated, and the same seal at their pleasure to break and alter, or devise a new one.

"SEC. 4. That no misnomer of the said corporation shall defeat or annul any donation, gift, grant, devise or bequest to or from the said corporation.

"SEC. 5. That said corporation shall not employ its funds or income, or any part thereof, in banking, or for any purpose or object other than those expressed in the first section of this act; and nothing in said act shall be construed to prevent Congress from altering, amending, or repealing the same."

By this act the college was fully incorporated and given all the powers and franchises usually conferred upon colleges instituted for instruction in the higher branches of education. Some years before the date of the will of the testator there were added to the college departments of medicine and of law, and those departments have been in active operation ever since.

If there had been in Georgetown, or even in the District of Columbia, an educational institution other than Georgetown College, of a name or title to which the descriptive terms "Georgetown University" could reasonably apply, a serious question of identity might arise. But there is no other institution that has such title or any such corporate name, as would justify the making of a claim under the will; and Georgetown College is the only institution that has made claim of the devise and bequests made to or for Georgetown University. It is alleged in the bill that because of such claim the persons who occupy the positions of the President and Directors of Georgetown College are made parties defendants, in order that the claim of that college might be adjudicated by the court. They have answered the bill, and while disclaiming any mere personal interest in the subject-matter, they make and insist upon the claim and right of the college to the devise and bequests to Georgetown University. In so doing we think they are well justified.

Under the circumstances of this case, and upon the proof produced on behalf of the president and directors of the college, we entertain no doubt whatever of the intention of the testator, and that the devise and bequests made by the terms of the will to Georgetown University were intended for Georgetown College; and that no other institution was within his contemplation in respect to such devise and bequests. And such being the case, the question arises whether such misnomer or misdescription of the corporation intended to take is of such a character as to defeat or annul the devise and bequests intended to and for the President and Directors of Georgetown College? We think not. The question after all is one of intention, and when the intention is made clear, if the person or object is under no legal disability to take, the intention of the testator will be carried into effective operation. In this case, by the terms of the act of incorporation of the college, it is declared that no misnomer of the said corporation shall defeat of annul any bequest or devise made to said corporation. But, apart from this statutory

declaration, the general principle of law fully embraces the case, and saves the validity of the devise and bequests to Georgetown College.

It is very true, as a general rule, that corporations must take and grant by their corporate name. Without a name they could not perform their corporate functions; and a name is so indispensable a part of the constitution of a corporation, that if none be expressly given, one may be assumed by implication. A misnomer in a grant by statute, or by a devise, to a corporation, does not avoid the grant, though the right name of the corporation be not used, provided the corporation really intended be made apparent. The general rule upon the subject, as the result of the cases, is summed up by Chancellor Kent in these brief terms: "The general rule to be collected from the cases, is that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it, and the modern cases show an increased liberality on the subject." 2 Kent, Com., 292.

And without adverting to this subject again, we may say, that the principle just stated fully applies to and relieves from objection, upon the ground of misnomer, the bequests in favor of St. Vincent's and St. Joseph's Catholic orphan asylums, in the city of Washington, as described in the will; the use of the word *Catholic* in the bequests, but not used in the proper corporate name, in no manner invalidating the bequests to those institutions.

2. The next objection taken to the validity of the devise and bequests to the Georgetown University, assuming the same to be intended for Georgetown College, is that they were intended as a devise and bequests to and for the support, use, and benefit of a religious sect, order, and denomination, and to a public teacher of the gospel as such, and that the gift and devise were not made at least one calendar month prior to the death of the testator, as required by sect. 457 Rev. Stats. D. C.; and are therefore void.

This objection clearly has no foundation in any fair construction of the terms of section 34 of the Maryland declaration of rights upon which it is based. The bequests in question are not to any minister, public teacher, or preacher of the gospel as such, or to any religious sect, order, or denomination, or to or for the support, use, or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination. The fact that the college is or may be under the administrative control of a religious order, known as the Order of Jesus, does not bring the institution within the prohibition of the declaration of rights. The college is not a religious institution intended for the tuition and propagation of a particular doctrine and creed of religious belief, to the exclusion of all other creeds and beliefs, but is an institution of learning for the admission and education of students of all denominations of religious faith. The act of incorporation of the college

does not limit the exercise of the corporate powers conferred to the promotion of any particular religious creed or denomination; but the college is open to all alike. For the limitations of the powers and objects of the college, we must look to the charter granted by Congress, and not elsewhere.

The objection urged would seem to be fully answered by the decision of the Supreme Court of the United States, in the case of *Bradfield v. Roberts*, 175 U. S., 296. That was the case of an appropriation by Congress for the erection of hospital buildings, and a part of which, under contract, was about to be applied for the erection of a building at Providence hospital to be used as part of that institution, which was under the auspices and control of an order of sisterhood of the Roman Catholic church. It was alleged and objected that such application of the congressional appropriation was in violation of that provision of the Constitution of the United States which declares that "Congress shall make no law respecting the establishment of religion." The application was for an injunction, and this court held, on appeal, that there was no ground for an injunction; and, on appeal to the Supreme Court of the United States, that decision was affirmed. The Supreme Court, in the course of its opinion, said:

"Assuming that the hospital (Providence hospital) is a private eleemosynary corporation, the fact that its members are members of a monastic order or sisterhood of the Roman Catholic church, and the further fact that the hospital is conducted under the auspices of such church, are wholly immaterial, as is also the allegation regarding title to its property. The statute provides as to its property, and makes no provision for its being held by any one other than itself. The facts above stated do not in the least change the legal character of the hospital or make a religious corporation out of a purely secular one, as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious denomination, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation. Nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic church. To be conducted under the auspices is to be conducted under the influence and patronage of that church. The meaning of the allegation is that the church exercises great, and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for certain definite purposes, and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation which is incorporated

under an act of Congress, and its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence. There is no allegation that this hospital is confined to members of that church, or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrine of the Roman Catholic church, but who are managing the corporation according to the law under which it exists. The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but on the contrary, those powers are to be exercised in favor of any one seeking the ministrations of that kind of an institution. All that can be said of that corporation itself is that it has been incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to. The act of Congress shows that there is nothing sectarian in the corporation, and the specific and limited object of its creation is the opening and keeping a hospital for the care of sick and invalid persons."

We have made this extended extract from the opinion of the Supreme Court because it seems to be entirely conclusive upon the particular question raised in this case. And that decision of the Supreme Court applies as well to the objection taken to the bequests in favor of St. Vincent's orphan asylum and the trustees of St. Joseph's male orphan asylum, as to the bequests in favor of the Georgetown College. It is unnecessary, therefore, to further discuss this question of the alleged religious character of the legatees.

3. We come next to the disposition of that part of the estate of the testator which he acquired under his father's will. This part of his estate is all devised and bequeathed to his trustees named; and by the first clause under this general devise and bequest the trustees are directed to pay and see to the application of $10,000 to Georgetown College, misnamed Georgetown University, to be used and held as an endowment for the prosecution of research in colonial history of Maryland and the District of Columbia, and the gathering and preserving archives and papers having relation thereto, and to be known as the James Ethelbert Morgan fund. This latter direction to the trustees is alleged to be void, because there is no chartered power in any institution which could take under this bequest, that authorizes it to prosecute such research and obtain and preserve the archives relating thereto. As we have seen, the act of incorporation of Georgetown College, of 1844, confers corporate power upon the institution for the instruction of youth in the liberal arts and sciences, and also clothes the corporation with power to take any estate whatsoever, in any lands, etc., or goods, chattels, moneys and other effects, by gift, bequest, devise, etc., and the same to grant, convey, or assign, and to place out on interest for the use of said college, and to apply the same. The cultivation of historical research would seem to be a part of a liberal education, such as should be encouraged by a college intended to confer degrees upon students in

acquiring a liberal education in the arts and sciences. We have many learned discourses upon the philosophy of history, and the term *science* is of a very large meaning in an educational point of view. Acknowledged truths and laws, in any department of mind or matter, digested and arranged into a system; a profound or complete knowledge of all acknowledged truths relating to any subject-matter. This is the definition of science, and it would seem to be comprehensive enough to embrace an inquiry into a matter of history, as a means of arriving at and establishing the truths of history—truth being the foundation of science. But even if it be thought that research in matters of history be not within the letter of the charter of the college, still, it is within the purview of the act, and germane to the objects and purposes of the incorporation. As said by the Supreme Court in *Jones v. Habersham*, 107 U. S. 189, "A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school, or an asylum. *Vidal v. Girard*, 2 How. 127; *McDonough v. Murdock*, 15 *id.* 367; *Perin v. Carey*, 24 *id.* 465. There is some ground for holding that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents, and works of art, with other such books and works to be selected by the officers of the society and purchased out of the surplus income; and that the purposes of the trust are, in the words of Mr. Justice Story in *Vidal v. Girard*, 'germane to the objects of the incorporation, and relate to matters which will promote, and aid, and perfect those objects.'"

The other objections urged against the validity of this bequest we do not think are well founded. There is no want of certainty or definiteness in the nature of the research directed or its object. Of course, the *modus operandi* of administering and applying the fund must depend, to a large extent, upon the agencies employed by the college authorities; and it will be the duty of the trustees that the court may appoint to exercise supervision over the administration of the fund. It does not follow, however, that this power of supervision was intended to be confined to the trustees named in the will; from the very nature of the power of such supervision it is required to be exercised by a succession of trustees. The death or resignation of the trustees named in the will before the conditions arose upon which the fund could be received and paid over to the college did not defeat or annul the bequest. Where the intention of the testator is clear, as it is in this case, the question of the wisdom or want of wisdom in making the bequest is not for the court to decide. But in this case, it is not difficult to perceive that the result of careful research into matters of interesting and important history, and

was intended by said testator for the endowment of any medical school conducted under authority of the charter granted June 10, 1844, by Congress to James Ryder and others, under the name of "The President and Directors of Georgetown College," the said charter not authorizing a medical school or the teaching of medicine, and especially because at the time of the making of the said will and at the time of the death of the testator there was, in the first place, a medical department in the institution of learning at Georgetown, in the District of Columbia, commonly called "Georgetown University" or the "University of Georgetown," which institution the acts of the legislature of Maryland had duly incorporated and given it corporate existence and powers, and the acts of Congress of March 1, 1815, and March 2, 1833, had duly recognized its corporate existence and given it university powers broad enough to authorize it to teach medicine and to carry on and operate a medical department; and because there was, in the second place, at the time of the death of the testator, a medical school in the District of Columbia, chartered under general laws applicable to the District of Columbia in 1886, under the name of "The Company of the Medical Department of Georgetown University," and which was operated as a department of said university, but which said medical school was abandoned after the death of said testator, and its charter lapsed, the conduct of said medical school having been taken over after testator's death by "Georgetown University" aforesaid. The court therefore erred in holding, declaring, or decreeing that said devise and bequest was intended for said The President and Directors of Georgetown College, chartered in 1844, for the endowment of the medical school connected with said college.

(7.) Because said devise and bequest to which said subclause "*b*" is applicable, not being to any corporation by its name, but to a "university," operating and claiming, as shown by the evidence and known to the testator at the time of the making of the will, to be in operation under several different charters, creating separate corporations, the said devise and bequest is too indefinite and uncertain as to the devisee intended, to be given effect.

II.

The court erred:

Because said finding and decree and opinion of the court construing said subclause "*b*" of the will, in so far as it determines that "The President and Directors of Georgetown College" (meaning the corporation chartered by act of Congress of June 10, 1844) are entitled to receive the devise and bequest to which said subclause "*b*" is applicable, is erroneous in this, that:

(1.) It is contrary to the evidence.

(2.) It is without evidence to support it.

(3.) It is contrary to the weight of the evidence.

(4.) And because said finding and decree in effect holds that said corporation, chartered in 1844 "for the instruction of youth in the

liberal arts and sciences," and authorized to receive bequests and devises for that purpose *solely*, and not for "any other purpose or object," is competent to conduct a medical school and to receive and administer such fund for such purpose.

(5.) And because the said finding is erroneous in this, that it is shown by the evidence that the persons claiming at the time of the making of said will, and now claiming, to be "The President and Directors of Georgetown College," the corporation chartered in 1844, were not and are not in fact the successors in deed or in law of James Ryder, Thomas Lilly, Samuel Barber, James Curley, and Anthony Rey, "with perpetual succession in deed or in law," who were incorporated under that name by said charter.

And it is shown by the evidence that the persons so claiming are not *de facto* members or officers of said corporation; but, in fact, the said corporation had been dissolved by the resignation or death of all its corporate members long prior to the making of said will.

And the court erred in matter of law in holding that such fact could not be inquired of and determined in this proceeding, but only in a direct proceeding instituted by the State to have the charter declared forfeited, such proceeding by the State being applicable only to cases where there has been a non-user or misuser of the corporate franchises and where there are surviving members of the corporation capable of being sued as such. And the court erred in not holding and decreeing that the said defendants, claiming to be "The President and Directors of Georgetown College," were not in fact the successors in deed or in law of the persons incorporated by the act of June 10, 1844, and in not holding and decreeing that they were not competent by reason of such loss of succession to take and receive said devises and bequests as such corporation chartered in 1844.

(6.) And because said finding in said decree is erroneous, in that the devise and bequest was to "Georgetown University, in the District of Columbia," an institution shown by the evidence to be operated under color of several different *characters*, but not itself a corporation by the name of "Georgetown University, in the District of Columbia," or by the name of "Georgetown University," the said institution as a whole being, as shown by the evidence, under the management and control of the Society of Jesus, a religious order, and operated in part as a religious college, under charter granted under the laws of Maryland to "The Corporation of Roman Catholic Clergymen" incorporated under the provisions of the Acts of the Legislature of Maryland of 1792, chapter 55, and 1797, chapter 40, and recognized as such corporation, with university powers, by acts of Congress of March 1, 1815, and March 2, 1833, and operated in part under the decretal order of the Pope of 1833.

Said devise and bequest having been made within less than thirty days before the death of the testator, and said devise and bequest being a gift, devise, and bequest of lands and goods and chattels for the support, use, and benefit of a religious sect, order, or denomina-

tion, and to a public teacher of the gospel, as such teacher, withi
the meaning and prohibition of the Maryland bill of rights and sec
tion 457 of the Revised Statutes of the District of Columbia.

(7.) And the court erred in reaching the conclusion on the fact
relative to said university not being a public teacher of religion, an
that said devise and bequest was not for the benefit of a religiou
sect, order, and denomination, by ruling and holding as matter o
law that the denials in the answers of the defendants Whitney an
others, sworn to by them, and without any opportunity given com
plainant to cross-examine them, was evidence in the case, and i
giving effect to said denials as evidence.

Whereas answer under oath was expressly waived in the bill, an
the said denials were not evidence in the cause; and whereas th
documentary evidence in the case, including the religious book
actually taught in the classes, as shown by the undisputed testimon
and the catalogues issued by the college through a course of year
giving the curriculum for the different classes, and showing that n
degree in the classical department can be taken at said college u
less the student takes the prescribed course in what is therein calle
"philosophy," being the course in the doctrinal teaching of th
church so denominated in the decretal order of 1833, made by th
Pope in respect thereto, was sufficient to fully establish the facts
denied.

(8.) And the court erred in reaching the conclusion on the fac
relative to said university not being a public teacher of religio
and that said devise and bequest was not for the benefit of a reli
ious sect, order, or denomination, by ruling and holding as matt
of law that under the decision of the Supreme Court in the case
Bradfield *vs.* Roberts, 175 U. S., 296, all questions in the case at b
as to the sufficiency of the proof as to whether said institution w
in fact a public teacher of the gospel, and whether said devise a
bequest was for the benefit of a religious sect, order, or denomin
tion, must be laid aside.

It being necessarily always a matter to be determined by the e
dence within the meaning and intent of the bill of rights:

(*a.*) Whether the devisee or legatee be in fact a public teacher
the gospel.

(*b.*) Whether the devise or legacy was intended by the testat
for the support, use, or benefit of such devisee or legatee in t
capacity of such teacher or for individual or other use.

(*c.*) Whether the devise was intended for the benefit or use of
religious sect or order or denomination.

(*d.*) Whether the use is for the benefit of or in ease of a religio
sect, order or denomination.

(9.) And the court erred in reaching said conclusion on the fa
relative to said university not being a public teacher of religi
and that said devise and bequest was not for the use or benefit o
religious sect, order or denomination; in holding and decreeing th
the testator, in making such devise to the "university" for purpo

in large part wholly without the scope of the charter powers of the corporation chartered in 1844, ever intended to limit his devise to the purposes of said charter, and in holding that even if it were shown by the evidence it is beyond the power of the court in this proceeding to determine and decree that it was the intent of the testator to make the devise and bequest for a purpose within the prohibition of the bill of rights and which, if carried into effect, would be applied to a purpose within said prohibition, and erred in holding and decreeing such devise and bequest valid; and the court erred in holding that even if the receiving and administering of such gift be *ultra vires* of the corporate charter of 1844, only the State could in a direct proceeding instituted for that purpose have such devise and bequest declared void; and so holding the court erred in decreeing that said president and directors were entitled to receive said devise and bequest.

(10.) The court erred in not decreeing that the devise and bequest to which subclause "*b*" of the will is applicable has lapsed, and that the same devolves upon the heirs-at-law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

For all of the foregoing reasons these appellants, James Mosher, substituted trustee, and Anna M. Mosher, pray that so much of said decree concerning said clause or subclause designated in the bill of complaint and in said opinion as *b* as finds, holds, and decrees that the same is "*held and declared to be a valid and effectual devise and bequest*," shall be reversed, and that so much of said decree as is set forth in said paragraph of said decree numbered or designated "second" shall be reversed.

CONWAY ROBINSON,
Solicitor for James Mosher, Substituted Trustee, and for Anna M. Mosher.

(Endorsed:) In the Court of Appeals of the District of Columbia. No. 1368. Michael J. Colbert, trustee, *et al.*, appellants, *vs.* Eleanora D. Speer. No. 1369. James Mosher, substituted trustee, and Anna M. Mosher, appellants, *vs.* John D. Whitney, *et al.* 1370. Eleanora D. Speer, appellant, *vs.* John D. Whitney, *et al.* Stipulation of counsel. Court of Appeals, District of Columbia. Filed Dec. 3, 1904. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia, October Term, 1904.

MICHAEL J. COLBERT, Trustee; JOHN D. WHITNEY, JAMES P. Fagan, Edward McTamany, James B. Becker, Edward I. Devitt, St. Vincent's Orphan Asylum, and The Trustees of St. Joseph's Male Orphan Asylum, Appellants,
vs.
ELEANORA D. SPEER. } No. 1368.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,
vs.
JOHN D. WHITNEY, JAMES P. FAGAN, EDWARD McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College; Michael J. Colbert, Substituted Trustee, and All Parties to This Suit Interested Adversely to James Mosher, Substituted Trustee, or to Anna M. Mosher or to Both of Them. } No. 1369.

ELEANORA D. SPEER, Appellant,
vs.
JOHN D. WHITNEY, JAMES P. FAGAN, EDWARD McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College; Michael J. Colbert, Substituted Trustee, and James Mosher, Substituted Trustee, and All Parties to This Suit Interested Adversely to Eleanora D. Speer. } No. 1370.

The above-named Eleanora D. Speer in her own behalf and by Emory Speer, her husband and next friend (complainant in equity cause No. 22,100 in the supreme court of the District of Columbia and appellee in appeal cause No. 1368 and in cross-appeal cause No. 1369, and appellant in cross-appeal cause No. 1370, in the Court of Appeals of the District of Columbia); and James Mosher one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher (defendants in said cause No. 22,100 in the supreme court of the District of Columbia, and appellees in said appeal cause No. 1368 and in said cross-appeal cause No. 1370, and appellants in said cross-appeal cause No. 1369, in the Court of Appeals of the District of Columbia) conceiving themselves aggrieved by the decree of said Court of Appeals of the District of Columbia passed and entered in said causes on the 12th day of October, 1904, at the present October term 1904 of said court, and by the opinion and directions contained therein mentioned and referred to in said decree; do hereby appeal from

same to the Supreme Court of the United States, and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

And they pray that the court will order and direct the original books and catalogues, in evidence described and designated as Exhibits J, K, L, B, C, D, E, and F, forming part of the record in the trial court, and sent up to this court under stipulation, and under order of this court made on May 24, 1904, shall be sent up to the Supreme Court of the United States in lieu of a copy of that part of the record, and be taken as part of the record in the Supreme Court of the United States on said appeal.

And these appellants herewith file with the clerk of this court their assignment of errors.

MARION ERWIN AND
OLIN J. WIMBERLY,

Solicitors for Appellants Eleanora D. Speer in Her Own Behalf and by Emory Speer, Her Husband and Next Friend.

CONWAY ROBINSON,

Solicitor for Appellants James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher.

(Endorsed:) No. 1368, 1369, & 1370. In the Court of Appeals of the District of Columbia. 1368. Michael J. Colbert, trustee, *et al.*, appellants, *vs.* Eleanora D. Speer. No. 1369. James Mosher, substitited trustee, and Anna M. Mosher, appellants, *vs.* John D. Whitney, *et al.* 1370. Eleanora D. Speer, appellant, *vs.* John D. Whitney, *et al.* Appeal to the Supreme Court of United States. Court of Appeals, District of Columbia. Filed Dec. 6, 1904. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia, October Term, 1904

MICHAEL J. COLBERT, Trustee; JOHN D. WHITNEY, JAMES P. Fagan, Edward McTamany, James B. Becker, Edward I. Devitt, St. Vincent's Orphan Asylum, and The Trustees of St. Joseph's Male Orphan Asylum, Appellants, } No. 1368

vs.

ELEANORA D. SPEER.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,

vs.

JOHN D. WHITNEY, JAMES P. FAGAN, EDWARD McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College; Michael J. Colbert, Substituted Trustee, and All Parties to This Suit Interested Adversely to James Mosher, Substituted Trustee, or to Anna M. Mosher, or to Both of Them. } No. 1369

ELEANORA D. SPEER, Appellant,

vs.

JOHN D. WHITNEY, JAMES P. FAGAN, EDWARD McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College; Michael J. Colbert, Substituted Trustee, and James Mosher, Substituted Trustee, and All Parties to This Suit Interested Adversely to Eleanora D. Speer. } No. 1370

And now to wit: at the October term, 1904, of the Court of Appeals of the District of Columbia, it is on this sixth day of December, A. D. 1904, in open court, ordered by the court, that said appeal to the Supreme Court of the United States of said Eleanora D. Speer in her own behalf and by Emory Speer her husband and next friend and of said James Mosher one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and of said Anna M. Mosher, from said decree of said Court of Appeals of the District of Columbia, passed and entered in said causes on the 12th day of October, 1904, be and the same is hereby allowed as prayed for, upon giving bond to act as a supersedeas in the penalty of ($100) one hundred dollars.

And it is hereby further ordered that the original books and catalogues, in evidence described and designated in the record as Exhibits J, K, L, B, C, D, E, and F, forming part of the record in the trial court, and sent up to this court under stipulation, and under order of this court made on May 24, 1904, shall be sent up to the

Supreme Court of the United States, in lieu of a copy of that part of the record and be taken as a part of the record in the Supreme Court of the United States on said appeal.

By the court,

M. F. MORRIS,
Associate Justice, Presiding.

(Endorsed:) No. 1368, 1369, & 1370. In the Court of Appeals of the District of Columbia. No. 1368. Michael J. Colbert, trustee, *et al.*, appellants, *vs.* Eleanora D. Speer. No. 1369. James Mosher, substituted trustee, and Anna M. Mosher, appellants, *vs.* John D. Whitney, *et al.* 1370. Eleanora D. Speer, appellant, *vs.* John D. Whitney, *et al.* Order allowing appeal and sending up original books, etc., to Supreme Court, U. S.—Court of Appeals, District of Columbia. Filed Dec. 6, 1904. Henry W. Hodges, clerk.

Know all men by these presents, that we, Eleanora D. Speer, in her own behalf and by Emory Speer her husband and next friend, James Mosher, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, appellants, as principals, and The United States Fidelity & Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto the appellees, John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker and Edward I. Devitt, representing themselves to be the President and Directors of Georgetown College, and Michael J. Colbert, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Saint Vincent's Orphan Asylum, and the Trustees of Saint Joseph's Male Orphan Asylum, and all parties interested adversely to said appellants in the full and just sum of one hundred dollars ($100.00) to be paid to the said appellees, their executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of December, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a Court of Appeals of the District of Columbia at the October term, 1904, thereof, on the 12th day of October, A. D., 1904, in a suit depending in said court, between said parties on appeal and cross appeals, which appeal and cross appeal causes are in said Court of Appeals numbered 1368, 1369 and 1370, respectively, a decree was rendered against the said appellants in said appeal and cross appeal causes and the said appellants having prayed and obtained an appeal in said appeal and cross appeal causes to the Supreme Court of the United States to reverse the said decree and a citation directed to the said appellees citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the

I.

Because said finding and decree and opinion of the court construing said sub-clause "*b*" of the will, in so far as it determines that the devise and bequest of which said sub-clause "*b*" is applicable, "to Georgetown University in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof," was a devise and bequest intended for "The President and Directors of Georgetown College" (the corporation chartered by the act of Congress of June 10, 1844), is erroneous in this, that:

(1.) It is contrary to the evidence.

(2.) It is without evidence to support it.

(3.) It is contrary to the weight of the evidence.

(4.) It is contrary to the express language of the will naming said devisee and legatee as "Georgetown University in the District of Columbia."

It being shown by the evidence:

That there was at the time of the making of the will an institution of learning in Georgetown in the District of Columbia, well known to the testator as "Georgetown University," and actually in operation as a university, and operated under color of several charters, other than the charter of June 10, 1844, granted by Congress to certain persons in the name of "The President and Directors of Georgtown College," * * * "for the instruction of youth in the liberal arts and sciences," only.

(5.) That in reaching said finding and decree the court erred in matter of law in holding that the act of Congress of June 10, 1844, aforesaid, repealed the act of the legislature of Maryland giving corporate powers to the said institution, and repealed the acts of Congress of March 1, 1815, and March 2, 1833, recognizing the corporate existence of said institution under the name of its officers the "President and Directors of Georgetown College in the District of Columbia" and sanctioning in said institution the authority to teach the professions as well as the liberal arts, and to confer degrees as a university; and in so holding the court erred in matter of fact in finding that said devise and bequest to which said sub-clause "*b*" is applicable, was intended solely for the corporation created by the said act of Congress of June 10, 1844.

(6.) That the court erred in said finding and decree & in the opinion filed therewith in holding and decreeing that one-half of the said devise and bequest to which sub-clause "*b*" is applicable, was intended by said testator, for the endowment of any medical school conducted under authority of the charter granted June 10, 1844, by Congress to James Ryder and others under the name of "The President and Directors of Georgetown College." The said charter not authorizing the teaching of such medical school, and there being at the time of making of the said will, and at the time of the death of the testator, a medical school in the District of Columbia, in which the said testator was a professor, chartered under

general laws applicable to the District of Columbia in 1886, under the name of "The Company of the Medical Department of Georgetown University," and which was operated as a department of said university, but which said medical school was abandoned after the death of said testator, and its charter lapsed. And the conduct of said medical school having been taken over after testator's death, by said defendants claiming to be The President and Directors of Georgetown College chartered in 1844, and without authority in said charter, the court erred in holding that said devise and bequest was intended for said president and directors of said college chartered in 1844 for the endowment of the medical school now connected therewith.

(7.) Because said devise and bequest to which said sub-clause "*b*" is applicable, not being to any corporation by its name, but to a "university" operated and claiming as shown by the evidence, and known to the testator at the time of the making of the will, to be in operation under several different charters creating separate corporations, the said devise and bequest is too indefinite and uncertain as to the devisee intended, to be given effect.

II.

The court erred:

Because said finding and decree and opinion of the court construing said sub-clause "*b*" of the will in so far as it determines that "The President and Directors of Georgetown College" (meaning the corporation chartered by act of Congress of June 10, 1844), are entitled to receive the devise and bequest to which said sub-clause "*b*" is applicable, is erroneous in this, that:

(1.) It is contrary to the evidence.

(2.) It is without evidence to support it.

(3.) It is contrary to the weight of the evidence.

(4.) And because said finding and decree in effect holds that said corporation chartered in 1844, "for the instruction of youth in the liberal arts and sciences," and authorized to receive bequests and devises for that purpose *solely*, and not for "any other purpose or object" is competent to conduct a medical school and to receive and administer such fund for such purpose.

(5.) And because the said finding is erroneous in this, that it is shown by the evidence that the persons claiming at the time of the making of said will, and now claiming to be "The President and Directors of Georgetown College," the corporation chartered in 1844, were not, and are not in fact the successors in deed or in law of James Ryder, Thomas Lilly, Samuel Barber, James Curley and Anthony Rey, "with perpetual succession in deed or in law," who were incorporated under that name by said charter.

And it is shown by the evidence that the persons so claiming are not *de facto* members or officers of said corporation. But, in fact, the said corporation had been dissolved by the resignation or death of all its corporate members long prior to the making of said will.

And the court erred in matter of law in holding that such fact could not be inquired of and determined in this proceeding, but only in a direct proceeding instituted by the State to have the charter declared forfeited; such proceeding by the State being applicable only to cases where there has been a non-user or misuser of the corporate franchises and where there are surviving members of the corporation capable of being sued as such. And the court erred in not holding and decreeing that the said defendants claiming to be "The President and Directors of Georgetown College," were not, in fact, the successors in deed or in law of the persons incorporated by the act of June 10, 1844, and in not holding and decreeing that they were not competent by reason of such loss of succession, to take and receive said devises and bequests as such corporation chartered in 1844.

(6.) And because said finding in said decree is erroneous in that the devise and bequest was to "Georgetown University in the District of Columbia," an institution shown by the evidence to be operated under color of several different charters, but not a corporation by itself. The said institution as a whole being as shown by the evidence under the management and control of the Society of Jesus, a religious order, and operated in part as a religious college under color of charter granted under the laws of Maryland to the "Corporation of Roman Catholic Clergymen" incorporated under the provisions of the acts of the legislature of Maryland of 1792, chapter 55, and 1797, chapter 40, and recognized as such corporation with university powers under the name of the "College at Georgetown" and "The President and Directors of Georgetown College in the District of Columbia," by acts of Congress of March 1, 1815, and March 2, 1833; and operated in part under the decretal order of the Pope of 1833.

Said devise and bequest having been made within less than thirty days before the death of the testator and said devise and bequest being a gift, devise and bequest of lands and goods and chattels, for the support, use and benefit of a religious sect, order and denomination, and to a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia.

(7.) And the court erred in reaching the conclusion on the facts relative to said university not being a public teacher of religion and that said devise and bequest was not for the benefit of a religious sect, order and denomination, by ruling and holding as matter of law that the denials in the answers of the defendants Whitney and others sworn to by them, and without any opportunity given complainant to cross-examine them was evidence in the case, and in giving effect to said denials as evidence.

Whereas answer under oath was expressly waived in the bill, and the said denials were not evidence in the cause. And whereas the documentary evidence in the case, including the religious books actually taught in the classes, as shown by the undisputed testimony,

and the catalogues issued by the college through a course of years, giving the curriculum for the different classes, and showing that no degree in the classical department can be taken at said college, unless the student takes the prescribed course in what is therein called "philosophy," being the course in the doctrinal teaching of the church, so denominated in the decretal order of 1833 made by the Pope in respect thereto, was sufficient to fully establish the facts so denied.

(8.) And the court erred in reaching the conclusion on the facts relative to said university not being a public teacher of religion, and that said devise and bequest was not for the benefit of a religious sect, order and denomination, by ruling and holding as matter of law, that under the decision of the Supreme Court in the case of Bradfield *vs.* Roberts, 175 U. S., 296, all questions in the case at bar as to the sufficiency of the proof as to whether said institution was in fact a public teacher of the gospel, and whether said devise and bequest was for the benefit of the same as such teacher, and for the benefit of a religious sect, order and denomination, must be laid aside.

It being necessarily always a matter to be determined by the evidence within the meaning and intent of the bill of rights:

(*a.*) Whether the devisee be in fact a public teacher of the gospel.

(*b.*) Whether the devise was intended by the testator for the support, use or benefit of such devisee in the capacity of such teacher, or for individual or other use.

(*c.*) Whether the devise was intended for the benefit or use of a religious sect, or order or denomination.

(*d.*) Whether the use is for the benefit of, or in ease of a religious sect, or order or denomination.

(9.) And the court erred in reaching said conclusion on the facts, relative to said university not being a public teacher of religion, and that said devise and bequest was not for the use or benefit of a religious sect, order and denomination; in holding and decreeing, that the testator in making such devise to the "university" for purposes in large part, wholly without the scope of the charter powers of the corporation chartered in 1844, ever intended to limit his devise to the purposes of said charter; and in holding that even if it were shown by the evidence, it is beyond the power of the court in this proceeding, to determine and decree that it was the intent of the testator to make the devise and bequest for a purpose within the prohibition of the bill of rights, and which if carried into effect would be applied to a purpose within said prohibition, and to declare such devise and bequest void. And the court erred in holding that even if the receiving and administering of such gift be *ultra vires* of the corporate charter of 1844, only the State could in a direct proceeding instituted for that purpose have such devise and bequest declared void; and so holding the court erred in decreeing that said president and directors were entitled to receive said devise and bequest.

(10.) The court erred in not decreeing that the devise and bequest to which sub-clause "*b*" of the will is applicable, has lapsed, and that the same devolves upon the heirs at law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

For all of the foregoing reasons this appellant prays that so much of said decree as is set forth in the paragraph of said decree numbered "second" be reversed.

MARION ERWIN,
OLIN J. WIMBERLY,
Solicitors for Appellant.

Assignment of Errors on Appeal of James Mosher, Substituted Trustee, and Anna M. Mosher, from Supreme Court of the District of Columbia to Court of Appeals, D. C., in Cross-appeal No. 1369.

Court of Appeals, District of Columbia, April Term, 1904.

JAMES MOSHER, Substituted Trustee, and ANNA M. Mosher, Appellants,
vs.
JOHN D. WHITNEY ET AL. } No. 1369.

Assignment of Errors.

James Mosher, substituted trustee, and Anna M. Mosher, having taken an appeal to the Court of Appeals of the District of Columbia from the decree of the supreme court of the District of Columbia, passed and entered in the above-entitled cause on the 21st day of May, A. D. 1903, hereby define, and each of them defines, the part or parts of said decree appealed from, and make, and each of them makes, this their, and each of their, assignment of errors, as follows: In construing said last will and testament of Ethelbert Carroll Morgan and determining the validity or invalidity of respective parts thereof and the devisees and legatees entitled to take thereunder, the court in said decree of May 21, 1903 (as well as in the opinion of the court filed in the cause and referred to in said decree):

1. Erred concerning said clause or subclause designated in the bill of complaint and in said opinion as *b*, in finding, holding, and decreeing that the same is "*held and declared to be a valid and effectual devise and bequest.*"

2. And further erred in finding, holding, and decreeing as follows:

"Second. That if his (testator's) said two sisters shall both die leaving no issue living at their deaths, then said substituted trustees shall under said subclause '*b*' deliver and convey all the property and estate to which said subclause '*b*' is applicable to the President and Directors of Georgetown College, in the District of Columbia, to

be an endowment in equal shares of the literary and medical schools connected with said college; and said President and Directors of Georgetown College are entitled to receive the same."

And appellants say, and each of them says, that in finding, holding, and decreeing as aforesaid the court erred, and appellants make, and each of them makes, the following additional assignments of error thereon, namely:

I.

Because said finding and decree and opinion of the court construing said subclause "*b*" of the will, in so far as it determines that the devise and bequest to which said subclause "*b*" is applicable (namely, the devise and bequest "to Georgetown University in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof"), was a devise and bequest intended for "The President and Directors of Georgetown College" (the corporation chartered by the act of Congress of June 10, 1844) is erroneous in this, that:

(1.) It is contrary to the evidence.

(2.) It is without evidence to support it.

(3.) It is contrary to the weight of the evidence.

(4.) It is contrary to the express language of the will naming said devisee and legatee as "Georgetown University in the District of Columbia."

It being shown by the evidence—

That there was at the time of the making of the will an institution of learning in Georgetown, in the District of Columbia, well known to the testator as "Georgetown University," and actually in operation as a university and operated under color of several charters (which charters are separate and distinct from the charter of June 10, 1844, that was granted by Congress to certain persons in the name of "The President and Directors of Georgetown College," * * * "for the instruction of youth in the liberal arts and sciences," only).

(5.) That in reaching said finding and decree the court erred in matter of law in holding that the act of Congress of June 10, 1844, aforesaid, repealed the acts of the legislature of Maryland giving corporate powers to and incorporating the said institution, and repealed the acts of Congress of March 1, 1815, and March 2, 1833, recognizing the corporate existence of said institution and sanctioning in said institution the authority to teach the professions as well as the liberal arts, and to confer degrees as a university; and in so holding the court erred in matter of fact in finding that said devise and bequest to which said subclause "*b*" is applicable was intended solely for the corporation created by the said act of Congress of June 10, 1844.

(6.) That the court erred in said finding and decree and in the opinion filed therewith, in holding and decreeing that one-half of the said devise and bequest to which subclause "*b*" is applicable

ligion, and that said devise and bequest was not for the benefit of a religious sect, order or denomination, by ruling and holding as matter of law that the denials in the answers of the defendants Whitney and others, sworn to by them, and without any opportunity given complainant to cross-examine them, was evidence in the case, and giving effect to such denials as evidence.

Whereas answer under oath was expressly waived in the bill, and the said denials were not evidence in the cause; and whereas the documentary evidence in the case, including the religious books actually taught in the classes, as shown by the undisputed testimony and the catalogues issued by the college through a course of years, giving the curriculum for the different classes, showing that no degree in the classical department can be taken at said college unless the student takes the prescribed course in what is therein called "philosophy," being the course in the doctrinal teaching of the church, so denominated in the decretal order of 1833, made by the Pope in respect thereto, was sufficient to fully establish the facts so denied;

(4.) Because said Court of Appeals erred in finding that said university was not a public teacher of religion, and that said devise and bequest was not for the benefit of a religious sect, order or denomination, by erroneously stating, ruling and finding in said opinion as follows:

"The act of incorporation of the college (meaning the act of Congress of June 10, 1844) does not limit the exercise of the corporate powers conferred, to the promotion of any particular religious creed or denomination; but the college is open to all alike. For the limitations of the powers and objects of the college, *we must look to the charter granted by Congress and not elsewhere.* The objection urged would seem to be fully answered by the decision of the Supreme Court of the United States, in the case of Bradfield *vs.* Roberts, 175 U. S. 296." And by so limiting the scope of its inquiry to said charter of June 10, 1844, said court thereupon erroneously stated, ruled and found in said opinion, that:

"The bequests in question are not to any minister, public teacher or preacher of the gospel as such, or to any religious sect, order, or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order, or denomination. The fact that the college is or may be under the administrative control of a religious order, known as the Order of Jesus, does not bring the institution within the prohibition of the declaration of rights. The college is not a religious institution intended for the tuition and propagation of a particular doctrine and creed of religious belief, to the exclusion of all other creeds and beliefs, but is an institution of learning for the admission and education of students of all denominations of religious faith."

And in so stating, ruling and finding the said Court of Appeals erroneously followed the ruling of the trial court, that under the

decision of the Supreme Court in the case of Bradfield *vs.* Roberts, 175 U. S. 296, all questions in the case at bar, as to the sufficiency of the proof as to whether said institution was *in fact* a public teacher of the gospel, and whether said devise and bequest was for the benefit of the same as such teacher, and for the benefit of a religious sect, order and denomination, *must be laid aside.*

And said Court of Appeals erred in basing said decree upon its said erroneous statements, rulings and findings.

And whereas, necessarily it must always be a matter to be determined by the evidence, within the meaning and intent of the bill of rights:

Whether the devisee or legatee be in fact a public teacher of the gospel.

Whether the devise or legacy *was intended* by the testator, for the support, use or benefit of such devisee or legatee in the capacity of such teacher, or for individual or other use.

Whether the devise or legacy *was intended* for the benefit or use of a religious sect, or order or denomination.

Whether the use to which such devise or legacy is to be applied, would in fact be for the benefit of, or in ease of a religious sect, or order, or denomination;

(5.) Because if said Court of Appeals be correct in construing the term "sciences" in the language of the charter of June 10, 1844, conferring corporate power upon James Ryder, *et al.*, under the name of "The President and Directors of Georgetown College," "for the instruction of youth in the liberal arts and sciences" not to be a limitation of corporate power to the teaching of the liberal arts and liberal sciences, (excluding the professions and theology as held by the trial court) but was a grant of corporate power to said institution chartered by said act of June 10, 1844, to teach all things comprehended in the broadest use of the word "science," defined in said opinion to be:

"Acknowledged truths and laws, in any department of mind or matter, digested and arranged into a system; a profound or complete knowledge of all acknowledged truths relating to any subject-matter," and if said bequest and devise be intended for that institution, then in such case the said charter of June 10, 1844, authorized and empowered said corporation to teach religion and theology and the said Court of Appeals erred, in not giving effect and due weight to the evidence which shows conclusively that said institution was at the time of the making of said will and of the death of the said testator, actually engaged, by and through its so-called literary department in the exercise of its legally authorized functions as a public teacher of the gospels, of religion, and of theology, and for that reason the said Court of Appeals erred in not holding said bequest and devise to which said sub-clause "*b*" is applicable, void as within the prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia;

(6.) Because the said Court of Appeals in said opinion, by errone-

ously stating, ruling and finding that "for the limitations of t powers and objects of the college, we must look to the chart granted by Congress, (meaning the act of Congress of June 10, 184 and not elsewhere," and in holding that the case at bar was co trolled by the principles announced in the case of Bradfield Roberts, 175 U. S. 296, in effect ruled out or rendered nugatory the evidence in the cause showing that as matter of fact said ins tution of learning intended as the devisee and legatee, by the test tor, was at the time of the making of said will and ever since h been a public teacher of the gospel, and of denominational religio and in effect ruled that if such teaching be *ultra vires* the charter said institution, only the State could in a direct proceeding institute for that purpose have such devise and bequest declared void;

And said Court of Appeals erred in basing said decree upon i said erroneous statements, rulings and findings;

(7.) Because the court erred in not decreeing that the devise an bequest to which sub-clause "*b*" of the will is applicable, has lapse and that the same devolves upon the heirs at law and next of ki of said Ethelbert Carroll Morgan, who are entitled to receive th same.

VI.

That said Court of Appeals erred in said decree of October 12th 1904, and in its opinion and directions, in so far as the same reverse and does not affirm that part of the decree of the supreme court o the District of Columbia passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will desig- nated "*c*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said resid- uary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, one of which is stated in said sub-clause "*c*" as follows:

"(*c*) To pay and see to the application of the sum of ten thousand dollars, ($10,000.) to Georgetown University in the District of Colum- bia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory em- braced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan fund."

And the said Court of Appeals in its said opinion and decree (find- ing and decreeing that said sub-clause "*c*" is valid and effectual and that the said corporation chartered on June 10, 1844, is entitled to receive the same) erred:

(1.) Because said bequest was not intended to be used for the in- struction of youth in the liberal arts and sciences;

(2.) Because it does not appear that any student connected with

said college would ever derive the slightest benefit from any result that might arise from the prosecution of the researches so vaguely referred to;

(3.) Because the prosecution of such research is foreign to the purpose for which said college was chartered;

(4.) Because said bequest is not for a charitable purpose, the public being given no right or interest therein, and said corporation chartered by act of Congress of June 10, 1844, as a private corporation, could not hold or execute a trust for a purpose not within the authority of its charter, even if germane thereto where the bequest is not a charity;

(5.) Because said bequest is not a charity, and there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or nonfeasance on the part of said college or of the trustees, and said bequest is therefore void;

(6.) Because said bequest is uncertain and indefinite as to how much of said bequest is to be "held" as an "endowment" or as a "fund" and how much of said bequest is to be "used" in the prosecution of research and obtaining and preserving archives and papers, the discretion for determining the same being vested in the trustees named in said will, one of whom is dead and the other resigned, and such discretion cannot be exercised by substituted trustees;

(7.) Because said bequest is too uncertain, vague and indefinite, as to the nature and extent of the research to be made into the colonial history of Maryland and the District of Columbia, and the object and purpose thereof, and as to the character and nature of the archives and papers to be obtained and preserved, for the exercise of discretion by the original trustees named in the will, and still more by substituted trustees;

(8.) Because said will was made less than thirty days prior to testator's death, and contained said gift, devise and bequest to Georgetown University, of goods and chattels, for the support, use and benefit of, and in ease of, a religious sect, order or denomination, or a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia, and said bequest is therefore void;

(9.) Because of the same errors as to said sub-clause "*c*" which have been hereinbefore assigned as to said sub-clause "*b*."

VII.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the supreme court of the District of Columbia passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*f*," in the bill of complaint, is applicable, is void and invalid

and of no effect, and that said bequest lapsed and fell into s residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devis and bequeathed his share in his father's estate, to his trustees nam in his will, to be held on certain uses and trusts, among which those stated in sub-clauses designated "*d*," "*e*" and "*f*" in the b of complaint, which are as follows:

"To pay and see to the application of——

(*d.*) A sum *not to succeed* five thousand ($5,000) dollars to be plied and expended under the personal supervision of his trust to the purchase and erection of a chime of bells and either a si altar or memorial window for some one Catholic church, said chur to be in the District and to be designated by his mother by her l will or otherwise.

(*e.*) And if his mother fails so to do, he directs his trustees to nate the *same* to some Catholic church giving a preference if the be one built by the Jesuits.

(*f.*) And if the foregoing gift be void he directs *said sum not ceeding $5000* shall be equally divided between Saint Vincent's a St. Joseph's Catholic orphan asylums in the city of Washington."

And the said Court of Appeals in its said opinion and decr (finding and decreeing that said sub-clauses "*d*" and "*i*" are i valid and void, but that said sub-clause "*f*" is valid and effectu and that the appellee corporations, the "Saint Vincent's Orph Asylum," and the "Trustees of St. Joseph's Male Orphan Asylum are entitled each to receive as legatees under said bequest one h of the sum of $5000) erred in so finding, holding and decreeing to said sub-clause "*f*;"

(1.) Because there was no definite sum donated, but the amou to be used and its expenditure was left to the personal supervisio of his trustees named, one of whom is dead and the other resigne And the $5000 was only named as a *maximum limit*, but the amou to be used was (within that limit) a matter left not merely to t discretion of trustees no longer capable of exercising it, but subje to caprice or choice of his mother.

(2.) Because the words "*said sum not exceeding $5000*" in said su clause "*f*" refers back to the *same uncertain sum* attempted to be co tingently disposed of in sub-clauses "*d*" and "*e*," in which claus the amount was an *uncertain sum* dependent upon an *uncertain obje* calling for greater or less expenditure according to the choice of t object and the caprice of his mother;

(3.) Because testator's persistence in the attempt to make sa precedent bequests covered by sub-clauses "*d*" and "*e*," (althoug from the language used by him in said sub-clause "*f*" he a pears to have been advised that said bequests in sub-clauses "*d* and "*e*" might be void,) makes it the evident intent of testator, tha a choice of an object should be made by his mother or by his trus tees under said sub-clauses "*d*" and "*e*," and that a sum (within th aforesaid maximum limit) sufficient in their discretion for the objec

selected, should be set apart by his trustees for that purpose, and that a test should be made of the right to so apply it, and only after failure so to achieve that object, is the sum so intended to be set apart, bequeathed by said sub-clause "*f*."

(4.) Because in said sub-clause "*f*" no definite amount is named, and it was only to be such an amount as his designated trustees named, exercising the discretion reposed in them personally, might have expended for a chime of bells and side altar or memorial window of an undesignated church;

(5.) Because the trustees named having no longer the power to execute the personal discretion vested in them, one being dead and the other resigned, the trust is not capable of being executed;

(6.) Because said gift and bequest to said "Catholic orphan asylums," was void as being in contravention of the Maryland bill of rights and section 457 of the Revised Statutes of the District of Columbia.

VIII.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the supreme court of the District of Columbia, passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*g*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, one of which is stated in said sub-clause "*g*" as follows:

"To pay and see to the application of—

(*g*.) A sufficient sum *not to exceed* three thousand dollars, the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship. (With the proviso that the qualifications under said clause shall be) that the applicant be born in the District of Columbia, and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown."

And the said Court of Appeals in its said opinion and decree, (finding and declaring that said sub-clause "*g*" is valid and effectual, and that the said corporation chartered on June 10, 1844, is entitled to receive the same) erred;

(1.) Because no definite sum was donated, and the amount to be used and its expenditure was left to the personal supervision of his trustees named, one of whom is dead and the other resigned. And

the $3000, was only named as a maximum limit, but the amoun be put out to earn the sufficient income, was (within that limi matter left not merely to the discretion of trustees no longer ca ble of exercising it, but subject to the uncertain ability of s trustees to make any certain sum upon which they might fix, e continuously any certain income, so that the amount of principa be withdrawn from testator's estate would be a varying quanti dependent upon the personal discretion of the said trustees, personal ability of the said trustees, the higher or lower rate of come obtainable, and the varying cost of maintaining from year year, such scholarship in the institution selected, or according which institution is selected;

(2.) Because said Court of Appeals, in construing said sub-clau "*g*" state and find in *its* said opinion:

"If the object in view should require the full amount of $3000 be expended, that amount will be applied; but if the object can accomplished for less only so much as may be required will be a plied:"

And erroneously hold and find that this discretion vest in said originally named trustees, is a discretion which pass to and can be exercised by substituted trustees;

(3.) Because under said sub-clause "*g*" the discretion to sele the particular medical college, in which the scholarship is to maintained, was reposed in the trustees named in the will, and e pired with the death of one and the resignation of the other, a cannot be exercised by substituted trustees;

(4.) Because said Court of Appeals, in construing said su clause "*g*," erroneously state and find in *its* opinion:

"In the first place, the testator himself has made his own sele tion by expressing his preference for Georgetown College, (meanin the corporation chartered June 10, 1844)" and erroneously hold an find that such expressed preference took away the discretion veste personally in his named trustees, by the testator in said sub-claus of said will to select some other medical college in the District Columbia, as the college in which said scholarship might be main tained, and by this construction erroneously render certain, an ele ment in the bequest which the testator left uncertain, and confide to the personal discretion of his named trustees, which discretio cannot be exercised by substituted trustees;

(5.) Because said Court of Appeals in construing said sub-claus "*g*" erroneously state and find in *its* said opinion, that it would b competent for said substituted trustees to apply said bequest to th maintenance of a scholarship in any medical school operated b said corporation chartered by act of Congress of June 10, 1844. Th said charter not authorizing said corporation to operate any medica school, and no provision having been made in said will for holding said bequest in abeyance until such charter could be obtained;

(6.) Because the bequest in said sub-clause "*g*" was not to any college, but really to testator's trustees, to apply the income for the

professional education in medicine of any person who might chance to stand the most excellent in a competitive examination. Neither in the character of the education or the designation of the recipient to be benefited does it fall within the definition of a charity. It is merely a benevolence or liberality.

And not being a charity, there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or nonfeasance on the part of the college or of the trustees, and said bequest is therefore void;

(7.) Because the bequest in said sub-clause "*g*," not being a charity, limited by the will to a definite certain class, the statement and holding of the court in its said opinion, that the discretion vested by the will in the originally named trustees passed to and could be exercised by substituted trustees, as in the case of charities, where the class is definitely and certainly fixed and the discretion of the trustees is limited only to the selection of the particular individuals who are to be benefited, was erroneous; and one of said original trustees being dead and the other resigned, said bequest lapsed;

(8.) Because said will was made less than thirty days prior to testator's death, and contained said gift, devise and bequest to, or in ease of, Georgetown University, of goods and chattels, for the support, use and benefit of, or in ease of, a religious sect, order or denomination, or public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia, and said bequest is therefore void;

(9.) Because of the same errors as to said sub-clause "*g*" which have been hereinbefore assigned as to said sub-clause "*b*."

MARION ERWIN AND
OLIN J. WIMBERLY,
Solicitors for Appellant Eleanora D. Speer, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend.
CONWAY ROBINSON,
Solicitor for Appellants James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher.

(Endorsed:) No. 1368, 1369 & 1370. In the Court of Appeals of the District of Columbia. 1368. Michael J. Colbert, trustee, *et al.*, appellants, *vs.* Eleanora D. Speer. No. 1369. James Mosher, substituted trustee, and Anna M. Mosher, appellants, *vs.* John D. Whitney, *et al.* 1370. Eleanora D. Speer, appellant, *vs.* John D. Whitney, *et al.* Assignment of errors on appeal to Supreme Court of United States. Court of Appeals, District of Columbia. Filed Dec. 6, 1904. Henry W. Hodges, clerk.

said appellants shall prosecute said appeal in said appeal and cross appeal causes to said Supreme Court to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ELEANORA D. SPEER. [SEAL.]
EMORY SPEER,
(*Husband & Next Friend of Eleanora D. Speer.*) [SEAL.]
JAMES MOSHER, [SEAL.]
Substituted Trustee as Aforesaid.
ANNA M. MOSHER. [SEAL.]

[Seal of the United States Fidelity & Guaranty Co.]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. S. SWORMSTEDT,
Attorney in Fact. [SEAL.]

Sealed and delivered by Eleanora D. Speer and Emory Speer, in the presence of
S. M. HAZLEWOOD.

Sealed and delivered by James Mosher, substituted trustee &c. and by Anna M. Mosher in the presence of
CONWAY ROBINSON.

Sealed and delivered in presence of (as to surety)—
LEE B. MOSHER.

Approved by
M. F. MORRIS,
Associate Justice Court of Appeals of the District of Columbia.

(Endorsed:) No. 1368, 1369 & 1370. In the Court of Appeals of the District of Columbia. 1368. Michael J. Colbert, trustee, *et al.*, appellants, *vs.* Eleanora D. Speer. 1369. James Mosher, substituted trustee, and Anna M. Mosher, appellants, *vs.* John D. Whitney, *et al.* 1370. Eleanora D. Speer, appellant, *vs.* John D. Whitney, *et al.* Supersedeas bond on appeal to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Dec. 6, 1904. Henry W. Hodges, clerk.

Assignment of Errors on Appeal to the Supreme Court of the United States.

ELEANORA D. SPEER, in Her Own Behalf and by EMORY SPEER, Her Husband and Next Friend, and James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher, Appellants,

vs.

MICHAEL J. COLBERT, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, and Edward I. Devitt, Sued as Representing Themselves to be the President and Directors of Georgetown College, and Saint Vincent's Orphan Asylum and The Trustees of St. Joseph's Male Orphan Asylum, Appellees.

Appeal to the Supreme Court of the United States from decree of October 12, 1904, passed by the Court of Appeals of the District of Columbia, in appeal cause number 1368 and cross-appeal causes number 1369 and 1370, in said Court of Appeals.

And now comes, Eleanora D. Speer, in her own behalf, and by Emory Speer her husband and next friend, and now come James Mosher one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, and as appellants on appeal to the Supreme Court of the United States, from the decree of the Court of Appeals of the District of Columbia passed and entered on the 12th day of October, 1904, in said appeal cause numbered 1368 and said cross-appeal causes numbered 1369 and 1370 in said Court of Appeals, and make this their assignment of errors, and say that in the record and proceedings in the above entitled matter, there is manifest error in this to wit:

I.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm, that part of the decree of the supreme court of the District of Columbia passed on May 21st, 1903, which construed the last will and testament of Ethelbert Carroll Morgan deceased, and which held declared and decreed that the devises and bequests to which the sub-clause of said will designated "*a*" in the bill of complaint, is applicable, are valid and effectual devises and bequests.

II.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same de-

clared, held and decreed that the devises and bequests to which the sub-clause of said will designated "*b*" in the bill of complaint, is applicable, are valid and effectual devises and bequests; and said Court of Appeals erred in not decreeing that the said devises and bequests to which said sub-clause "*b*" is applicable are void, not only for indefiniteness and uncertainty, but also because within the prohibition of the Maryland bill of rights and section 457 of the Revised Statutes of the District of Columbia; and said Court of Appeals erred in not decreeing that said devises and bequests to which said sub-clause "*b*" is applicable have lapsed, and devolve upon and pass to the heirs at law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

III.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm, those parts of the decree of the supreme court of the District of Columbia passed on May 21st, 1903, which construed the last will and testament of Ethelbert Carroll Morgan, deceased, and which held, declared and decreed that the bequests to which the sub-clauses of said will respectively designated "*c*," "*f*" and "*g*," in the bill of complaint, are applicable, are void and invalid, and of no effect, and that the bequests attempted to be made by said sub-clauses, or to which said sub-clauses are applicable, have lapsed and become inoperative; and further that all of said void and lapsed legacies, being bequests of money have fallen into the residuum of the estate of said testator, and pass to the beneficiaries under the terms of the residuary clause of said will designated as clause "*i*" in said bill of complaint, which residuary clause was held, declared and decreed to be valid and effectual.

IV.

That said decree of said Court of Appeals of October 12th, 1904, with its opinion and directions, construing sub-clause "*b*" of Ethelbert Carroll Morgan's will, (*i. e.* the sub-clause designated "*b*" in the bill of complaint) is erroneous, so far as it determines that the devise and bequest to which said sub-clause "*b*" is applicable (viz: the devise and bequest "to Georgetown University in the District of Columbia, to be an endowment in equal shares of the literary and medical departments thereof"), is a devise and bequest intended for "The President and Directors of Georgetown College," the corporation chartered by the act of Congress of June 10th, 1844;

(1.) Because it is contrary to the evidence, and to the express language of said will naming said devisee and legatee as "Georgetown University in the District of Columbia;"

(2.) Because it is conclusively shown by the evidence, that there was at the time of the making of said will an institution of learning

in Georgetown in the District of Columbia, well known to the testator as "Georgetown University," and actually in operation as a university, under color of charter or charters, (which charter or charters are separate and distinct from said charter of June 10th, 1844, granted by Congress to certain persons, in the name of "The President and Directors of Georgetown College" * * * "for the instruction of youth in the liberal arts and sciences" only);

(3.) Because said finding and decree of said Court of Appeals erroneously makes said act of Congress of June 10th, 1844, repeal the Acts of Assembly of the State of Maryland of November, 1792, ch. 55 and November 1797, ch. 40, incorporating "The Corporation of the Roman Catholic Clergymen" and their successors, with corporate power to acquire, hold, establish, and conduct the college established at Georgetown, afterwards commonly known as Georgetown University, and also repeal the acts of Congress of March 1, 1815 and March 2nd, 1833, recognizing the corporate existence of said previously existing institution, and its president and directors, referred to therein as the "President and Directors of Georgetown College in the District of Columbia" and sanctioning in said institution the authority to teach the professions as well as the liberal arts, and to confer degrees as a university, and as such corporation to take and hold property and to sell and dispose of the same under their corporate seal. Notwithstanding that, at the time of the making of said will and of testator's death, said institution of learning at Georgetown in the District of Columbia was claiming corporate powers, franchises and existence under said acts passed prior to the aforesaid act of June 10, 1844, and was in operation as a university and specifically claiming university powers and charter franchises under said acts of Congress of March 1, 1815 and March 2, 1833, and the devise was made by testator to said institution in the name of "Georgetown University in the District of Columbia" under its said claim, as then made, of corporate existence, franchises and powers;

(4.) Because in finding and decreeing that said devise and bequest (*i. e.* sub-clause "*b*") was intended solely for said institution chartered by the act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College," the said Court of Appeals erred in holding that there was not in operation in Georgetown, in the District of Columbia, an educational institution (incorporated or un-incorporated) other than the institution operated solely under said charter of June 10, 1844, "of a name or title to which the descriptive terms 'Georgetown University' could reasonably apply."

Whereas the evidence conclusively shows that at the time of Ethelbert Carroll Morgan's death and of the making of said will and prior thereto, there was at Georgetown in the District of Columbia, an institution of learning commonly known as Georgetown University, claiming its establishment under said Maryland acts, and claiming its university powers and franchises under said act of

Congress of March 1, 1815, and holding lands under said Maryland acts, and under said act of Congress of March 2, 1833, granting lands to it as a corporation ;

(5.) Because in finding and decreeing that said devise and bequest (*i. e.* said sub-clause "*b*") was intended solely for said institution chartered by said act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College," said Court of Appeals erroneously state:

"It is not averred or pretended that there is any such institution as 'Georgetown University' in existence or operation in this District," and erroneously base said decree complained of upon this idea and misstatement of the record and of the contention and position of these appellants before that court, as appears by the pleadings, assignments of error, and contentions in said court of appeals;

(6.) Because in finding and decreeing that said devise and bequest (*i. e.* said sub-clause "*b*") was intended solely for the institution chartered by said act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College" said Court of Appeals erroneously state:

"It is not attempted to be shown that there was or is in existence in this District any such incorporated institution of learning as 'Georgetown University' separate from and independent of Georgetown College" (the said court meaning by "Georgetown College" the corporation chartered by said act of Congress of June 10, 1844), and erroneously base said decree complained of upon this idea and misstatement of the record, and of the contention and position of these appellants before that court, as appears by the pleadings, evidence, assignments of error, and contentions in said Court of Appeals.

(7.) That said Court of Appeals, erred in said finding and decree and in the opinion filed therewith, in holding and decreeing that one-half of the said devise and bequest to which said sub-clause "*b*" is applicable, was intended by said testator, for the endowment of any medical school conducted under authority of said charter granted June 10, 1844, by Congress to James Ryder and others, under the name of "The President and Directors of Georgetown College." The said charter not authorizing a medical school or the teaching of medicine, and there being at the time of making said will, and at the time of the death of the testator, and known to him, a medical school, or a medical department, in which he was a professor, in the institution of learning, in the District of Columbia, commonly called "Georgetown University," and which was not operated under said charter of June 10, 1844, but under a charter or charters separate and distinct therefrom.

(8.) Because said devise and bequest to which said sub-clause "*b*" is applicable, not being to any corporation by its name, but to a "university," operated, and claiming to be in operation, as shown by the evidence and known to the testator at the time of the making

of the will, under several different charters, creating separate corporations, the said devise and bequest is too indefinite and uncertain as to the devisee intended, to be given effect.

V.

That said decree of said Court of Appeals of October 12, 1904, with its opinion and directions construing said sub-clause "*b*" of said testator's will is erroneous, so far as it determines that the devise and bequest to which said sub-clause "*b*" is applicable (viz: the devise and bequest to "Georgetown University in the District of Columbia, to be an endowment in equal shares of the literary and medical departments thereof") is a valid and effectual devise and bequest to "The President and Directors of Georgetown College," the corporation chartered by the act of Congress of June 10, 1844, and that said corporation is entitled to take, receive or hold the same;

(1) Because said finding and decree in effect holds that said corporation chartered June 10, 1844, "for instruction of youth in the liberal arts and sciences" and authorized to receive bequests and devises for that purpose *solely*, and not for "any other purpose or object" is competent to conduct a medical school and to receive and administer such fund for such purpose, whereas it is not competent so to do;

(2) Because said finding in said decree is erroneous, in that the devise and bequest was to "Georgetown University in the District of Columbia," an institution shown by the evidence to be operated under color of several different charters, but not itself a corporation by the name of "Georgetown University in the District of Columbia," or by the name of "Georgetown University," the said institution as a whole being, as shown by the evidence, under the management and control of the Society of Jesus, a religious order, and operated in part as a religious college, under charter, or color of charter, granted under the laws of Maryland to "The Corporation of Roman Catholic Clergymen" incorporated under the provisions of the Acts of the Legislature of Maryland of 1792, chapter 55, and 1797, chapter 40, and recognized as such corporation, with university powers, by acts of Congress of March 1, 1815, and March 2, 1833, which refer to it as the College of Georgetown in the District of Columbia, and make grants to the President and Directors of Georgetown College in the District of Columbia, and operated in part under the decretal order of the Pope of March 30, 1833. Said devise and bequest having been made within less than thirty days before the death of the testator, and being a gift, devise, and bequest of lands, goods and chattels, for the support, use and benefit of a religious sect, order or denomination, and to a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia;

(3.) Because said court erred in reaching the conclusion on the facts relative to said university not being a public teacher of re-

Ada M. Hill. His will was made and dated *only thirteen days prior to his death*. It was duly admitted to probate and record in this District, and letters testamentary were duly granted to William J. Stephenson and John H. Magruder, the executors therein named, who duly qualified as such executors. Thereafter said Stephenson died, leaving said Magruder as surviving executor of said will. Said Ethelbert Carroll Morgan, in his said will, after making certain pecuniary and specific bequests, appointed said William J. Stephenson and John H. Magruder trustees of all the rest of his estate to hold the same upon certain uses and trusts, as will fully and at large appear by said will (Rec., pp. 14 to 17). Under decree of the supreme court of the District of Columbia, in equity cause No. 16147, the defendants, James Mosher and Michael J. Colbert, were substituted as trustees under said will in place of said John H. Magruder, who resigned, and William J. Stephenson, deceased (Rec. pp. 83 and 84).

Said Ethelbert Carroll Morgan was the son of James E. Morgan, who died on June 2, 1889, testate. The latter's last will and testament was, by the supreme court of the District of Columbia, construed in equity cause No. 18045, and decrees for the distribution of his estate were entered therein. Said James E. Morgan died seized and possessed of personal property and real estate, some of said realty in Maryland, but the greater portion in this District. Ethelbert Carroll Morgan was a legatee and devisee in his father's said will and, under the decrees of distribution, his share in his father's personal estate was paid over to John H. Magruder, surviving executor, and by him was paid over to said Mosher and Colbert, substituted trustees (Rec. pp. 2 and 3).

Said Ethelbert Carroll Morgan died seized and possessed of both real and personal property in this District, besides that derived from his father's estate. His real property, other than that which came from his father's estate, passed into the possession of Mosher and Colbert, substituted trustees, as aforesaid, and his personal estate left in trust, as

aforesaid, other than that derived from his share of his father's estate, passed into the possession of John H. Magruder, surviving executor, and by him was paid over to said Mosher and Colbert, substituted trustees (Rec., pp. 2 and 3.)

James Mosher and Michael J. Colbert, as substituted trustees (Rec., p. 3), received real and personal property derived from the individual estate of Ethelbert Carroll Morgan, as aforesaid, and on April 1, 1900, held in their possession, as substituted trustees (and still hold):

Real estate in Washington, D. C., assessed at....	$5,000.00
Personal estate	17,804.10
	$23,804.10

James Mosher and Michael J. Colbert, as substituted trustees (Rec., pp. 3 and 4), received also the share of Ethelbert Carroll Morgan in the estate of his father, James E. Morgan, under the decree of distribution, as aforesaid, and on April 1, 1900, held in their possession (and still hold) the shares or proceeds thereof, as follows:

Real estate and proceeds of same in the District of Columbia	$25,327.33
Personal estate.....	27,477.83
Proceeds of Maryland real estate.....	1,786.76
	$54,591.92

The bill (Rec., pp. 1–13), which is brought by said Eleanora D. Speer, interpleads, as defendants therein, Michael J. Colbert and James Mosher, substituted trustees under said will of Ethelbert Carroll Morgan, deceased; John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker and Edward I. Devitt, representing themselves to be the President and Directors of Georgetown College; the St. Vincent's Orphan Asylum, the Trustees of St. Joseph's Male Orphan Asylum, and Anna M. Mosher.

The complainant in her bill (Rec., pp. 1 to 13) and the trial court below in its opinion (Rec., pp. 87 to 117) and decree (Rec., pp. 84 to 86) designate nine of the clauses of Ethelbert Carroll Morgan's said will by letters (*a*) to (*i*), which description will be retained for convenience in this brief.

The bill (Rec., pp. 1 to 13) contends that clauses designated by the letters *a* and *i* are valid, but attacks in detail the validity of the clauses designated by the letters *b*, *c*, *d*, *e*, *f*, *g*, and *h*.

The trial court below (Rec., pp. 84 to 86) on May 21, 1903, decreed that clauses *a* and *b* were valid and effectual devises and bequests, and decreed that clauses *c*, *d*, *e*, *f*, *g*, and *h* were void and invalid and of no effect, and that the bequests attempted to be made by them, or to which they are applicable, lapsed and became inoperative; and further decreed that all of said void and lapsed legacies, being bequests of money, fall into the residuum of the estate of said testator, Ethelbert Carroll Morgan, and pass to the beneficiaries under the terms of the residuary clause of said will designated in the bill of complaint and in said opinion of the trial court as clause *i*, which clause is decreed to be valid and effectual.

The Court of Appeals of the District of Columbia in its opinion (Rec., pp. 126 to 141), and decreee of October 12, 1904 (Rec., p. 142), *held* that said clauses *a*, *b*, *c*, *f*, *g*, and *i*, were valid and effectual devises and bequests, and that said clauses *d*, *e*, and *h*, were void and invalid and of no effect. From said opinion, decision, and decree of the Court of Appeals of the District of Columbia the appellants appealed to this Court, and the case is now here upon such appeal.

ASSIGNMENT OF ERRORS ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

ELEANORA D. SPEER, in Her Own Behalf and by EMORY SPEER, Her Husband and Next Friend, and James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher, Appellants,

vs.

MICHAEL J. COLBERT, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, and Edward I. Devitt, Sued as Representing Themselves to be the President and Directors of Georgetown College, and Saint Vincent's Orphan Asylum and The Trustees of St. Joseph's Male Orphan Asylum, Appellees.

Appeal to the Supreme Court of the United States from decree of October 12, 1904, passed by the Court of Appeals of the District of Columbia, in appeal cause number 1368 and cross-appeal causes number 1369 and 1370, in said Court of Appeals.

And now comes, Eleanora D. Speer, in her own behalf, and by Emory Speer, her husband and next friend, and now come James Mosher one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, and as appellants on appeal to the Supreme Court of the United States, from the decree of the Court of Appeals of the District of Columbia passed and entered on the 12th day of October, 1904, in said appeal cause numbered 1368 and said cross-appeal causes numbered 1369 and 1370 in said Court of Appeals, and make this their argument of errors, and say that in the record and proceedings in the above entitled matter, there is manifest error in this, to wit:

I.

The said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm, that part of the decree of the Supreme Court of the District of Columbia passed on May 21st, 1903, which construed the last will and testament of Ethelbert Carroll Morgan, deceased, and which held, declared and decreed that the devises and bequests to which the sub-clause of said will designated "*a*" in the bill of complaint, is applicable, are valid and effectual devises and bequests.

II.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same declared, held and decreed that the devises and bequests to which the sub-clause of said will designated "*b*" in the bill of complaint, is applicable, are valid and effectual devises and bequests; and said Court of Appeals erred in not decreeing that the said devises and bequests to which said sub-clause "*b*" is applicable are void, not only for indefiniteness and uncertainty, but also because within the prohibition of the Maryland bill of rights and section 457 of the Revised Statutes of the District of Columbia; and said Court of Appeals erred in not decreeing that said devises and bequests to which said sub-clause "*b*" is applicable have lapsed, and devolve upon and pass to the heirs at law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

III.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm, those parts of the decree of the supreme court of the District of Columbia passed on May 21st, 1903, which construed the last will and

testament of Ethelbert Carroll Morgan, deceased, and which held, declared and decreed that the bequests to which the sub-clauses of said will respectively designated "*c*," "*f*," and "*g*," in the bill of complaint, are applicable, are void and invalid, and of no effect, and that the bequests attempted to be made by said sub-clauses, or to which said sub-clauses are applicable, have lapsed and become inoperative; and further that all of said void and lapsed legacies, being bequests of money have fallen into the residuum of the estate of said testator, and pass to the beneficiaries under the terms of the residuary clause of said will designated as clause "*i*" in said bill of complaint, which residuary clause was held, declared and decreed to be valid and effectual.

IV.

That said decree of said Court of Appeals of October 12th, 1904, with its opinion and directions, construing sub-clause "*b*" of Ethelbert Carroll Morgan's will, (*i. e.* the sub-clause designated "*b*" in the bill of complaint) is erroneous, so far as it determines that the devise and bequest to which said sub-clause "*b*" is applicable (viz: the devise and bequest "to Georgetown University in the District of Columbia, to be an endowment in equal shares of the literary and medical departments thereof"), is a devise and bequest intended for "The President and Directors of Georgetown College," the corporation chartered by the act of Congress of June 10th, 1844;

(1.) Because it is contrary to the evidence, and to the express language of said will naming said divisee and legatee as "Georgetown University in the District of Columbia;"

(2.) Because it is conclusively shown by the evidence, that there was at the time of the making of said will an institution of learning in Georgetown in the District of Columbia, well known to the testator as "Georgetown University," and actually in operation as a university, under

color of charter or charters (which charter or charters are separate and distinct from said Charter of June 10th, 1844, granted by Congress to certain persons, in the name of "The President and Directors of Georgetown College" * * * "for the instruction of youth in the liberal arts and sciences," only);

(3.) Because said finding and decree of said Court of Appeals erroneously makes said act of Congress of June 10th, 1844, repeal the Acts of Assembly of the State of Maryland of November, 1792, ch. 55, and November 1797, ch. 40, incorporating "The Corporation of the Roman Catholic Clergymen" and their succes-ors, with corporate power to acquire, hold, establish, and conduct the college established at Georgetown, afterwards commonly known as Georgetown University, and also repeal the acts of Congress of March 1, 1815 and March 2nd, 1833, recognizing the corporate existence of said previously existing institution, and its president and directors, referred to therein as the "President and Directors of Georgetown College in the District of Columbia" and sanctioning in said institution the authority to teach the professions as well as the liberal arts, and to confer degrees as a university, and as such corporation to take and hold property and to sell and dispose of the same under their corporate seal. Notwithstanding that, at the time of the making of said will and of testator's death, said institution of learning at Georgetown in the District of Columbia was claiming corporate powers, franchises and existence under said acts passed prior to the aforesaid act of June 10, 1844, and was in operation as a university and specifically claiming university powers and charter franchises under said acts of Congress of March 1, 1815, and March 2, 1833, and the devise was made by testator to said institution in the name of "Georgetown University in the District of Columbia" under its said claim, as then made, of corporate existence, franchises and powers;

(4.) Because in finding and decreeing that said devise and bequest (*i. e.* sub-clause *b*") was intended solely for said institution chartered by the act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College," the said Court of Appeals erred in holding that there was not in operation in Georgetown, in the District of Columbia, an educational institution (incorporated or un-incorporated) other than the institution operated solely under said charter of June 10, 1844, "of a name or title to which the descriptive terms 'Georgetown University' could reasonably apply."

Whereas the evidence conclusively shows that at the time of Ethelbert Carroll Morgan's death and of the making of said will and prior thereto, there was at Georgetown in the District of Columbia, an institution of learning commonly known as Georgetown University, claiming its establishment under said Maryland acts, and claiming its university powers and franchises under said act of Congress of March 1, 1815, and holding lands under said Maryland acts, and under said act of Congress of March 2, 1833, granting lands to it as a corporation;

(5.) Because in finding and decreeing that said devise and bequest (*i. e.* said sub-clause "*b*") was intended solely for said institution chartered by said act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College," said Court of Appeals erroneously state:

"It is not averred or pretended that there is any such institution as 'Georgetown University' in existence or operation in this District," and erroneously base said decree complained of upon this idea and misstatement of the record and of the contention and position of these appellants before that court, as appears by the pleadings, assignments of error, and contentions in said Court of Appeals;

(6.) Because in finding and decreeing that said devise and bequest (*i. e.*, said sub-clause "*b*") was intended solely

UNITED STATES OF AMERICA, *ss:*

To Michael J. Colbert, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased; to John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, and Edward I. Devitt, sued as representing themselves to be the President and Directors of Georgetown College; to Saint Vincent's Orphan's Asylum, and to the Trustees of St. Joseph's Male Orphan Asylum, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal taken and allowed in the Court of Appeals of the District of Columbia, and filed in the clerk's office of said Court of Appeals, wherein, Eleanora D. Speer, in her own behalf and by Emory Speer her husband and next friend, and James Mosher one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, are appellants, from the decree of October 12th, 1904, passed by the said Court of Appeals in appeal cause number 1368, and cross-appeal causes numbers 1369 and 1370 in said Court of Appeals, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris justice of the Court of Appeals of the District of Columbia, this 6th day of December, in the year of our Lord one thousand nine hundred and four.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

We hereby accept service of the foregoing citation, this 6th day of December 1904.

HAMILTON & COLBERT,
Solicitors for John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, and Edward I. Devitt, Representing Themselves to be the President and Directors of Georgetown College, and Michael J. Colbert, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Saint Vincent's Orphan Asylum and the Trustees of St. Joseph's Male Orphan Asylum, Appellees, as Aforesaid.

Dec. 6, 1904.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 6 1904 Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 192 inclusive, together with Exhibits J, K, L, B, C, D, E, and F, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the cases of Michael J. Colbert, trustee, *et al.*, appellants *vs.* Eleanora B. Speer No. 1368. James Mosher, substituted trustee, and Anna M. Mosher, appellants *vs.* John D. Whitney, *et al.* No. 1369. Eleanora D. Speer, appellant *vs.* John D. Whitney, *et al.* No. 1370. October term, 1904, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 29th day of December A. D. 1904.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,587. District of Columbia Court of Appeals. Term No. 153. Eleanora D. Speer, in her own behalf and by Emory Speer, her husband and next friend; James Mosher, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, appellants, *vs.* Michael J. Colbert, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, *et al.* Filed January 3d, 1905. File No. 19,587.

FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

Supreme Court U. S.
FILED
DEC 13 1905
JAMES H. McKENNEY,
Clerk.

No. 153

Eleanora D. Speer, in her own behalf and by Emory Speer, her husband and next friend; James Mosher, one of the Substituted Trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, Appellants,

vs.

Michael J. Colbert, one of the Substituted Trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, et al.

BRIEF ON BEHALF OF JAMES MOSHER, SUBSTITUTED TRUSTEE, AND ANNA M. MOSHER.

CONWAY ROBINSON,
Solicitor for James Mosher, Substituted Trustee, and for Anna M. Mosher.

19470 JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 153.

ELEANOR D. SPEER, IN HER OWN BEHALF AND BY EMORY SPEER, HER HUSBAND AND NEXT FRIEND; JAMES MOSHER, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, AND ANNA M. MOSHER, APPELLANTS,

vs.

MICHAEL J. COLBERT, ONE OF THE SUBSITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, *et al.*

BRIEF ON BEHALF OF JAMES MOSHER, SUBSTITUTED TRUSTEE, AND ANNA M. MOSHER.

Statement of the Case.

This is a suit to obtain a judicial construction of Ethelbert Carroll Morgan's last will and testament (Rec., pp. 14 to 17). He died May 5, 1901, unmarried and childless, leaving surviving him as his only next of kin and only heirs-at-law two brothers and three sisters, namely, James Dudley Morgan, Cecil Morgan, Eleanora D. Speer, Anna M. Mosher, and

for the institution chartered by said act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College," said Court of Appeals erroneously state:

"It is not attempted to be shown that there was or is in existence in this District any such incorporated institution of learning as 'Georgetown University,' separate from and independent of Georgetown College," (the said court meaning by "Georgetown College" the corporation chartered by said act of Congress of June 10, 1844), and erroneously base said decree complained of upon this idea and misstatement of the record, and of the contention and position of these appellants before that court, as appears by the pleadings, evidence, assignments of error, and contentions in said Court of Appeals.

(7.) That said Court of Appeals erred in said finding and decree, and in the opinion filed therewith, in holding and decreeing that one-half of the said devise and bequest, to which said sub-clause "*b*" is applicable, was intended by said testator for the endowment of any medical school conducted under authority of said charter granted June 10, 1844, by Congress to James Ryder and others, under the name of "The President and Directors of Georgetown College," the said charter not authorizing a medical school or the teaching of medicine, and there being at the time of making said will, and at the time of the death of the testator and known to him, a medical school or medical department, in which he was a professor, in the institution of learning, in the District of Columbia, commonly called "Georgetown University," and which was not operated under said charter of June 10, 1844, but under a charter or charters separate and distinct therefrom.

(8.) Because said devise and bequest, to which said sub-clause "*b*" is applicable, not being to any corporation by its name, but to a "university," operated and claiming to be in operation, as shown by the evidence and known to

the testator at the time of the making of the will, under several different charters, creating separate corporations, the said devise and bequest is too indefinite and uncertain as to the devisee intended, to be given effect.

V.

That said decree of said Court of Appeals of October 12, 1904, with its opinion and directions construing said subclause "*b*" of said testator's will is erroneous, so far as it determines that the devise and bequest to which said subclause "*b*" is applicable (viz: the devise and bequest to "Georgetown University in the District of Columbia, to be an endowment in equal shares of the literary and medical departments thereof") is a valid and effectual devise and bequest to "The President and Directors of Georgetown College," the corporation chartered by the act of Congress of June 10, 1844, and that said corporation is entitled to take, receive or hold the same;

(1.) Because said finding and decree in effect holds that said corporation chartered June 10, 1844, "for instruction of youth in the liberal arts and sciences" and authorized to receive bequests and devises for that purpose *solely*, and not for "any other purpose or object" is competent to conduct a medical school and to receive and administer such fund for such purpose, whereas it is not competent so to do;

(2.) Because said finding in said decree is erroneous, in that the devise and bequest was to "Georgetown University in the District of Columbia," an institution shown by the evidence to be operated under color of several different charters, but not itself a corporation by the name of "Georgetown University in the District of Columbia," or by the name of "Georgetown University," the said institution as a whole being, as shown by the evidence, under the management and control of the Society of Jesus, a religious order, and operated in part as a religious college, under charter, or color of charter, granted under the laws of Maryland to

"The Corporation of Roman Catholic Clergymen" incorporated under the provisions of the Acts of the Legislature of Maryland of 1792, chapter 55, and 1797, chapter 40, and recognized as such corporation, with university powers, by acts of Congress of March 1, 1815, and March 2, 1833, which refer to it as the College of Georgetown in the District of Columbia, and make grants to the President and Directors of Georgetown College in the District of Columbia, and operated in part under the decretal order of the Pope of March 30, 1833. Said devise and bequest having been made within less than thirty days before the death of the testator, and being a gift, devise, and bequest of lands, goods and chattels, for the support, use and benefit of a religious sect, order or denomination, and to a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia;

(3.) Because said court erred in reaching the conclusion of the facts relative to said university not being a public teacher of religion, and that said devise and bequest was not for the benefit of a religious sect, order or denomination, by ruling and holding as matter of law that the denials in the answers of the defendants Whitney and others, sworn to by them, and without any opportunity given complainant to cross-examine them, was evidence in the case, and giving effect to such denials as evidence.

Whereas answer under oath was expressly waived in the bill, and the said denials were not evidence in the cause; and whereas the documentary evidence in the case, including the religious books actually taught in the classes, as shown by the undisputed testimony and the catalogues issued by the college through a course of years, giving the curriculum for the different classes, showing that no degree in the classical department can be taken at said college unless the student takes the prescribed course in what is therein called "philosophy," being the course in the doc-

trinal teaching of the church, so denominated in the decretal order of 1833, made by the Pope in respect thereto, was sufficient to establish the facts so denied;

(4.) Because said Court of Appeals erred in finding that said university was not a public teacher of religion, and that said devise and bequest was not for the benefit of a religious sect, order or denomination, by erroneously stating, ruling and finding in said opinion as follows:

"The act of incorporation of the college (meaning the act of Congress of June 10, 1844) does not limit the exercise of the corporate powers conferred, to the promotion of any particular religious creed or denomination; but the college is open to all alike. For the limitations of the powers and objects of the college, *we must look to the charter granted by Congress and not elsewhere.* The objection urged would seem to be fully answered by the decision of the Supreme Court of the United States, in the case of Bradfield *vs.* Roberts, 175 U. S. 296." And by so limiting the scope of its inquiry to said charter of June 10, 1844, said court thereupon erroneously stated, ruled and found in said opinion, that:

"The bequests in question are not to any minister, public teacher or preacher of the gospel as such, or to any religious sect, order, or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order, or denomination. The fact that the college is or may be under the administrative control of a religious order, known as the Order of Jesus, does not bring the institution within the prohibition of the declaration of rights. The college is not a religious institution intended for the tuition and propagation of a particular doctrine and creed of religious belief, to the exclusion of all other creeds and beliefs, but is an institution of learning for the admission and education of students of all denominations of religious faith."

And in so stating, ruling and finding the said Court of Appeals erroneously followed the ruling of the trial court, that under the decision of the Supreme Court in the case of Bradfield *vs.* Roberts, 175 U. S. 296, all question in the case at bar, as to the sufficiency of the proof as to whether said institution was *in fact* a public teacher of the gospel, and whether said devise and bequest was for the benefit of the same as such teacher, and for the benefit of a religious sect, order and denomination, *must be laid aside.*

And said Court of Appeals erred in basing said decree upon its said erroneous statements, rulings and findings.

And whereas, necessarily it must always be a matter to be determined by the evidence, within the meaning and intent of the bill of rights:

Whether the devisee or legatee be in fact a public teacher of the gospel.

Whether the devise or legacy *was intended* by the testator, for the support, use or benefit of such devisee or legatee in the capacity of such teacher, or for individual or other use.

Whether the devise or legacy *was intended* for the benefit or use of a religious sect or order or denomination.

Whether the use to which such devise or legacy is to be applied, would in fact be for the benefit of, or in case of a religious sect, or order, or denomination;

(5) Because if said Court of Appeals be correct in construing the term "sciences" in the language of the charter of June 10, 1844, conferring corporate power upon James Rider, *et al.*, under the name of "The President and Directors of Georgetown College," "for the instruction of youth in the liberal arts and sciences" not to be a limitation of corporate power to the teaching of the liberal arts and liberal sciences (excluding the professions and theology as held by the trial court), but was a grant of corporate power to

said institution chartered by said act of June 10, 1844, to teach all things comprehended in the broadest use of the word "science," defined in said opinion to be:

"Acknowledged truths and laws, in any department of mind or matter, digested and arranged into a system; a profound or complete knowledge of all acknowledged truths relating to any subject-matter," and if said bequest and devise be intended for that institution, then in such case the said charter of June 10, 1844, authorized and empowered said corporation to teach religion and theology and the said Court of Appeals erred, in not giving effect and due weight to the evidence which shows conclusively that said institution was at the time of the making of said will and of the death of the testator, actually engaged, by and through its so-called literary department in the exercise of its legally authorized functions as a public teacher of the gospels, of religion, and of theology, and for that reason the said Court of Appeals erred in not holding said bequest and devise to which said sub clause "*b*" is applicable, void as within the prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia;

(6.) Because the said Court of Appeals in said opinion, by erroneously stating, ruling and finding that "for the limitations of the powers and objects of the college, we must look to the charter granted by Congress (meaning the act of Congress of June 10, 1844), and not elsewhere," and in holding that the case at bar was controlled by the principles announced in the case of Bradfield *vs.* Roberts, 175 U. S. 296, in effect ruled out or rendered nugatory all the evidence in the cause showing that as matter of fact said institution of learning intended as the devisee and legatee, by the testator, was at the time of the making of said will and ever since has been a public teacher of the gospel, and of denominational religion; and in effect ruled that if such teaching be *ultra vires* the charter of said institution, only

the State could in a direct proceeding instituted for that purpose have such devise and bequest declared void;

And said Court of Appeals erred in basing said decree upon its said erroneous statements, rulings and findings;

(7.) Because the court erred in not decreeing that the devise and bequest to which sub-class "*b*" of the will is applicable, has lapsed and that the same devolves upon the heirs at law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

VI.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the supreme court of the District of Columbia passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*c*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, one of which is stated in said sub-clause "*c*" as follows:

"(*c*) To pay and see to the application of the sum of ten thousand dollars ($10,000) to Georgetown University in the District of Columbia to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan fund."

And the said Court of Appeals in its said opinion and decree (finding and decreeing that sub-clause "*c*" is valid and effectual and that the said corporation chartered on June 10, 1844, is entitled to receive the same) erred:

(1.) Because said bequest was not intended to be used for the instruction of youth in the liberal arts and sciences;

(2.) Because it does not appear that any student connected with said college would ever derive the slightest benefit from any result that might arise from the prosecution of the researches so vaguely referred to;

(3.) Because the prosecution of such research is foreign to the purpose for which said college was chartered;

(4.) Because said bequests is not for a charitable purpose, the public being given no right or interest therein, and said corporation chartered by act of Congress of June 10, 1844, as a private corporation, could not hold or execute a trust for a purpose not within the authority of its charter, even if germane thereto where the bequest is not charity;

(5.) Because said bequest is not a charity, and there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or nonfeasance on the part of said college or of the trustees, and said bequest is therefore void;

(6.) Because said bequest is uncertain and indefinite as to how much of said bequest is to be "held" as an "endowment" or as a "fund" and how much of said bequest is to be "used" in the prosecution of research and obtaining and preserving archives and papers, the discretion for determining the same being vested in the trustees named in said will, one of whom is dead and the other resigned, and such discretion can not be exercised by substituted trustees;

(7.) Because said bequest is too uncertain, vague and indefinite, as to the nature and extent of the research to be made into the colonial history of Maryland and the District of Columbia, and the object and purpose thereof, and as to character and nature of the archives and papers to be ob-

tained and preserved, for the exercise of discretion by the original trustees named in the will, and still more by substituted trustees;

(8.) Because said will was made less than thirty days prior to testator's death, and contained said gift, devise and bequest to Georgetown University, of goods and chattels, for the support, use and benefit of, and in ease of, a religious sect, order or denomination, or a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia, and said bequest is therefore void;

(9.) Because of the same errors as to said sub-clause "*c*" which have been hereinbefore assigned as to said sub-clause "*b*."

VII.

That said Court of Appeals erred in said decree of October 12th, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the supreme court of the District of Columbia passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan; and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*f*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, among which are those stated in sub-clauses "*d*," "*e*," and "*f*" in the bill of complaint, which are as follows:

"To pay and see to the application of——

(*d*.) A sum *not to exceed* five thousand ($5,000) dollars to be applied and expended under the personal supervision of

his trustees to the purchase and erection of a chime of bells and either a side altar or memorial window for some one Catholic church, said church to be in the District and to be designated by his mother by her last will or otherwise.

(e.) And if his mother fails so to do, he directs his trustees to donate the *same* to some Catholic church giving a preference if there be one built by the Jesuits.

(f.) And if the foregoing gift be void he directs *said sum not exceeding $5,000* shall be equally divided between St. Vincent's and St. Joseph's Catholic orphan asylums in the City of Washington."

And the said Court of Appeals in its said opinion and decree (finding and decreeing that said sub-clauses "*d*" and "*i*" are invalid and void, but that said sub-clause "*f*" is valid and effectual, and that the appellee corporations, the "Saint Vincent's Orphan Asylum," and the "Trustees of St. Joseph's Male Orphan Asylum" are entitled each to receive as legatees under said bequest one-half of the sum of $5,000) erred in so finding, holding and decreeing as to said sub-clause "*f*."

(1.) Because there was no definite sum donated, but the amount to be used and its expenditure was left to the personal supervision of his trustees named, one of whom is dead and the other resigned. And the $5,000 was only named as a *maximum limit*, but the amount to be used was (within that limit) a matter left not merely to the discretion of trustees no longer capable of exercising it, but subject to caprice or choice of his mother.

(2.) Because the words "*said sum not exceeding $5,000*" in said sub-clause "*f*" refers back to the *said uncertain sum* attempted to be contingently disposed of in sub-clauses "*d*" and "*e*," in which clauses the amount was an *uncertain sum* dependent upon an *uncertain object* calling for the greater or less expenditure according to the choice of the object and the caprice of his mother;

(3.) Because testator's persistence in the attempt to make said precedent bequests covered by sub-clauses "*d*" and "*e*," (although from the language used by him in said sub-clause "*f*" he appears to have been advised that said bequests in sub-clauses "*d*" and "*e*" might be void), makes it the evident intent of testator, that a choice of an object should be made by his mother or by his trustees under said sub-clauses "*d*" and "*e*," and that a sum (within the aforesaid maximum limit) sufficient in their discretion for the object selected, should be set apart by his trustees for that purpose and that a test should be made of the right to so apply it, and only after failure so to achieve that object, is the sum so intended to be set apart, bequeathed by said sub-clause "*f*."

(4.) Because in said sub-class "*f*" no definite amount is named, and it was only to be such an amount as his designated trustees named, exercising the discretion reposed in them personally, might have expended for a chime of bells and side altar or memorial window of an undesignated church;

(5.) Because the trustees named having no longer the power to execute the personal discretion vested in them, one being dead and the other resigned, the trust is not capable of being executed;

(6.) Because said gift and bequest to said "Catholic orphan asylums," was void as being in contravention of the Maryland bill of rights and section 457 of the Revised Statutes of the District of Columbia.

VIII.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the Supreme Court of the District of Columbia, passed on May 21, 1903, which construed said will of Ethelbert Car-

roll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*g*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share of his father's estate, to his trustees named in his will, to be held on certain uses and trusts, one of which is stated in said sub-clause "*g*" as follows:

"To pay and see to the application of—

(*g*.) A sufficient sum *not to exceed* three thousand dollars, the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship. (With the proviso that the qualifications under said clause shall be) that the applicant be born in the District of Columbia, and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown."

And the said Court of Appeals in its said opinion and decree (finding and declaring that said sub-clause "*g*" is valid and effectual, and that the said corporation chartered on June 10, 1844, is entitled to receive the same), erred;

(1.) Because no definite sum was donated, and the amount to be used and its expenditure was left to the personal supervision of his trustees named, one of whom is dead and the other resigned. And the $3,000, was only named as a maximum limit, but the amount to be put out to earn the sufficient income, was (within that limit) a matter left not merely to the discretion of trustees no longer capable of exercising it, but subject to the uncertain ability of said

trustees to make any certain sum upon which they might fix, earn continuously any certain income, so that the amount of principal to be withdrawn from testator's estate would be a varying quantity, dependent upon the personal discretion of the said trustees, the personal ability of the said trustees, the higher or lower rate of income obtainable, and the varying cost of maintaining from year to year, such scholarship in the institution selected, or according to which institution is selected;

(2.) Because said Court of Appeals, in construing said sub-clause "*g*" state and find in *its* said opinion:

"If the object in view should require the full amount of $3,000 to be expended, that amount will be applied; but if the object can be accomplished for less only so much as may be required will be applied;"

And erroneously hold and find that this discretion vested in said originally named trustees, is a discretion which passed to and can be exercised by substituted trustees;

(3.) Because under said sub-clause "*g*" the discretion to select the particular medical college, in which the scholarship is to be maintained, was reposed in the trustees named in the will, and expired with the death of one and the resignation of the other, and can not be exercised by substituted trustees;

(4.) Because said Court of Appeals, in construing said sub-clause "*g*" erroneously state and find in *its* opinion:

"In the first place, the testator himself has made his own selection by expressing his preference for Georgetown College (meaning the corporation chartered June 10, 1844)," and erroneously hold and find such expressed preference took away the discretion vested personally in his named trustees, by the testator in said sub-clause of said will to select some other medical college in the District of Columbia, as the college in which said scholarship might be main-

tained, and by this construction erroneously render certain, an element in the bequest which the testator left uncertain, and confided to the personal discretion of his named trustees, which discretion can not be exercised by substituted trustees;

(5.) Because said Court of Appeals in construing said sub-clause "*g*" erroneously state and find in *its* said opinion, that it would be competent for said substituted trustees to apply said bequest to the maintenance of a scholarship in any medical school operated by said corporation chartered by act of Congress of June 10, 1844. The said charter not authorizing said corporation to operate any medical school, and no provision having been made in said will for holding said bequest in abeyance until such charter could be obtained;

(6.) Because the bequest in said sub-clause "*g*" was not to any college, but really to testator's trustees, to apply the income for the professional education in medicine of any person who might chance to stand the most excellent in a competitive examination. Neither in the character of the education or the designation of the recipient to be benefited does it fall within the definition of a charity. It is merely a benevolence or liberality.

And not being a charity, there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance, or nonfeasance on the part of the college or of the trustees, and said bequest is therefore void;

(7.) Because the bequest in said sub clause "*g*," not being a charity, limited by the will to a definite certain class, the statement and holding of the court in its said opinion, that the discretion vested by the will in the originally named trustees passed to and could be exercised by substituted trustees, as in the case of charities, where the class is definitely and certainly fixed and the discretion of the trustees

is limited only to the selection of the particular individuals who are to be benefited, was erroneous; and one of said original trustees being dead and the other resigned, said bequest lapsed;

(8.) Because said will was made less than thirty days prior to testator's death, and contained said gift, devise and bequest to, or in ease of, Georgetown University, of goods and chattels, for the support, use and benefit of, or in ease of a religious sect, order or denomination, or public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia, and said bequest is therefore void;

(9.) Because of the same errors as to said sub-clause "*g*" which have been hereinbefore assigned as to said sub-clause "*b*."

MARION ERWIN and
OLIN J. WIMBERLY,

Solicitors for Appellant Eleanora D. Speer, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend.

CONWAY ROBINSON,

Solicitor for Appellants James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher.

POINTS OF LAW, and of Fact, Authorities and Arguments.

I.

Definition of University and of College.

Father Daugherty, claiming to be the president of *Georgetown University*, in response to questions by his counsel (Rec., pp. 69, 70), testified:

"By Mr. Colbert:

"Q. What is your present position?

"A. I am president of *Georgetown University*.

"Q. How many departments are there connected with *Georgetown University*, so called?

"A. The *university* is composed of the *college*, or the *undergraduate course*, as I call it, of the *medical department*, which is now composed of two departments, the *dental* and *medical*; and the *law department*.

"They are the three departments of which I am president and of which I appoint the professors. I have, of course, only a general management of the two departments of *medicine* and *law*.

"Q. Will you please tell us what is the difference or distinction between a *college*, so called, and a *university*?

"A. In order to define a *university*, we have to take either the German idea or the ordinary idea that we have of a *university*.

"Cardinal Newman says that a university, according to his idea, is a place where universal knowledge is taught.

"Our idea of *university*, generally, is *that it is a combination of schools in which the* PROFESSIONS, USUALLY LAW, MEDICINE AND THEOLOGY, *are taught*, and in which there is also *an undergraduate department*.

"In England Oxford University, for instance, as you know, is merely an aggregate of colleges" (Rec., pp. 69, 70).

The Legal Definitions.

"A COLLEGE is an organized assembly or collection of persons established by law and empowered to co-operate for the performance of some special function, or for the promotion of some given object, which may be *educational*, political, *ecclesiastical*, or scientific in its character."

27 Am. & Eng. Ency. of Law, p. 682.
Black's Law Dict.—"College"—p. 220.

"In the most common use of the word, it (COLLEGE) designates an institution of learning (usually incorporated) which offers instruction in the *liberal arts and humanities* and in scientific branches, BUT NOT IN THE TECHNICAL ARTS OR THOSE STUDIES PREPARATORY TO ADMISSION TO THE PROFESSIONS." Black's Law Dict.—"College"—p. 221.

"A UNIVERSITY is an institution of higher learning consisting of an assemblage of colleges united under one corporate organization and government, *affording instruction in the* ARTS, SCIENCES AND THE LEARNED PROFESSIONS, *and conferring degrees.*" 27 Am. & Eng. Ency. of Law—"University"—p. 682; Black's Law Dict.—"University"—p. 1202.

II.

HISTORY OF GEORGETOWN UNIVERSITY.

Under notice to produce, the defendants, claiming to be the President and Directors of Georgetown College, produced (Rec., p. 28) the catalogues of the institution conducted by them for the years 1890, 1891, 1899, 1900, and 1901, and said catalogues are in evidence marked Exhibits B, C, D, E, and F (Rec., pp. 28, 46).

FATHER DAUGHERTY testified that they correctly set forth the *history*, the *teachings*, and the *practice* of the institution and its relationship to the Society of Jesus and the Catholic Church (Rec., pp. 31, 32).

The *history*, taken from said *Exhibit B* (Catalogue 1889–'90, pp. 3 and 14), is as follows:

"Georgetown University."

"Founded 1789."

"Chartered as a University,"

"By act of Congress, March 1st, 1815."

"Empowered by the Holy See"

"To Grant Degrees in Philosophy and Theology, March 30, 1833."

"College of Medicine, Founded 1851."

"College of Law, Founded 1870."

"This college was the first Catholic institution of *higher learning* founded in the United States, having been established in the year 1789, through the efforts of Rev. John Carroll, afterwards the first bishop of Baltimore. Classes, however, were not opened until 1791. Upon the reorganization of the Society of Jesus in Maryland, the Georgetown Academy, as it was then called, was transferred to the fathers of that society, under whose control and direction the *University* still remains.

"The college *was chartered as a* UNIVERSITY, by act of Congress March 1, 1815.

"In the year 1833 by an especial decree, the Holy See empowered *Georgetown University* to grant degrees in *philosophy* and *theology*.

"In 1845, an *astronomical observatory* was erected and fully equipped.

"The *College of Medicine* was opened in 1851 and the *College of Law* in 1870" (Exhibit B, pp. 3 & 14).

In this Catalogue 1889–1890 (*Exhibit B*) under the head of "*School of Medicine*" (Catalogue, p. 12) the name of *Ethelbert Carroll Morgan* appears as *professor of laryngology*.

This was the last catalogue issued prior to his death, as his death is noted in the next succeeding catalogue.

It cannot be doubted, therefore, that he was cognizant of the fact that the institution claimed to exist as an "*incorpo-*

rated university" and to exercise *franchise university powers* under said act of Congress of 1815, as stated in its catalogue; and was not then an institution confined in its scope to the *limited purposes* given to the President and Directors of Georgetown College by the charter of 1844.

Exhibit C (Catalogue of 1890–'91, p. 16) states:

"Its (the institution's) foundation has hitherto been referred to the year 1789; but recent researches by the Rev. John Gilmary Shea, in connection with his history of the college, have established the fact that the earliest building was begun in the year 1788; students, however, were not received before 1791. Upon the reorganization of the *Society of Jesus* in Maryland in 1805, the Georgetown Academy, as it was then called, was transferred to the *fathers of that society*, under whose control and direction the *university* still remains" (*Exhibit C*, p. 16).

The history taken from *Exhibit D* (Catalogue 1898–'99, p. 10) and from *Exhibit E* (Catalogue 1899–1900, p. 18), and from *Exhibit F* (Catalogue 1900–1901, p. 17), is set forth as follows:

"The foundation of Georgetown College was projected as early as the year 1785, when the Rev. John Carroll, afterwards the first archbishop of Baltimore, formed the plan and proposed it to his associates. On November 13, 1786, *the Corporation of Roman Catholic Clergymen*, in the chapter held at Whitemarsh, Md., adopted a series of "*Resolves concerning the institution of a school*," in which *it ordered that a* SCHOOL *should be erected at Georgetown, Md.*, and directed the sale of a piece *of land belonging to the* CORPORATION, *in order that the proceeds might be applied to the erection of the first building.* Rev. Messrs. John Carroll, James Pelling, Robt. Molyneux, John Ashton and Leonard Neale were appointed directors.

"Shortly afterwards, an appeal was issued entitled '*Proposals to establish an academy at Georgetown, Potowmack river, Maryland.*' In this circular it was stated that 'Agreeably to the liberal principles of our constitution, the *seminary* will be open *to students of every religious profession.*'

"In 1788 the erection of the first building was undertaken; yet 1789 is commonly considered the year of the foundation of the college, as the deed of the original piece of ground was dated January 23 in that year.

"Students were not received before 1791. Upon the reorganization of the *Society of Jesus* in Maryland in 1805, the Georgetown College, as it had already begun to be called, was transferred to the *fathers of that society*, under whose control and direction the *university* still remains."

Exhibit D (Catalogue 1898–'99, p. 17) quotes the act of Congress of March 1, 1815, and then states:

"Two years later the power of granting degrees, thus acquired, was first exercised" (*Exhibit D*, p. 17).

The brief or bull of Clement XIV in 1773 was issued to suppress the Society of Jesuits in every State of Christendom; but, as explained by Father Daugherty (Rec., p. 38), "there were certain formalities to be complied with in order that that brief should be executed," and "there is a question in the society whether the society was actually ever suppressed altogether" (Rec., p. 38). "The question was, whether we were ever really suppressed, that is entirely suppressed, because the formulas were not entirely carried out" (Rec., p. 38). Jesuit priests had accompanied the first expedition sent out by Lord Baltimore to Maryland, and they and their successors had been performing the duties of their faith until the bull of Clement XIV, better known as Gangamelli. At that date Father Carroll was studying his profession in Europe, but was obliged to return to Maryland. The exercise of the functions of all the members of the order was suspended until the issue of the Bull of Restoration by Pope Pius VII in 1814.

The clergy of that church were in such an unprotected condition during this period of suspension that the legislature of Maryland, in November, 1792, passed the statute, chapter 55, which recited in (§ 1): "Whereas it has been represented to the General Assembly that certain property,

real, personal and mixed, or the rents and profits thereof, have been theretofore applied to the use, support and maintenance of *ministers of the Roman Catholic religion*, although the said property hath been held and possessed by certain individuals as the legal proprietors thereof, but under a confidential or implied trust, that the said property and the rents and profits thereof should be faithfully applied to the use, support or maintenance of *ministers of the Roman Catholic religion;* and whereas by the declaration of rights, all gifts or devises for the support, use, or benefit of any minister or preacher of the gospel, as such, or of any religious sect, order or denomination, without the leave of the legislature, are declared to be void; and whereas it is highly reasonable and just to grant unto *ministers of the Roman Catholic religion*, who are citizens of this State, that legislative aid, without which *they* will be destitute of that protection and security to *their* property to which *they* are entitled equally with every other SECT OR DENOMINATION OF CHRISTIANS;" and then enacted (notwithstanding said declaration of rights) as follows:

"§ 2. That every legal proprietor or possessor of any property, real, personal or mixed, held and possessed *on or before the 14th day of August, 1776*, under a confidential trust that the same, or the rents or profits thereof, should be applied to the use, support or maintenance, of *ministers of the Roman Catholic religion*, and every legal proprietor or possessor of any property, real, personal or mixed, acquired since the 14th day of August, 1776, by exchange for property held under a confidential trust as aforesaid, *before the said 14th day of August, 1776*, may have full power and authority, at any time hereafter, to execute an instrument of writing, declaring the purposes for which the said property hath been or is held in confidential trust, which said declaration, so to be made, shall be signed by the party making the same, in presence of two witnesses, and acknowledged in the same manner as deeds are directed by law to be acknowledged; and on the said declaration shall be endorsed the affidavit of the party, that the property comprehended in such declaration was really and *bona fide* held for pious purposes, or

acquired as aforesaid, in manner and for the purposes aforesaid; and the same affidavit shall be recorded, with the same declaration, within six months after execution thereof."

"§ 3. That it shall and may be lawful for the *ministers of the Roman Catholic religion* within this State, citizens thereof, *exercising their ministerial functions agreeably to the rules and discipline of their church*, and in whose favor the said declarations shall have been made, to convene at a place to be by them agreed on, within twelve months from the passing of this act, and then and there *adopt such regulations for the management of their estates and temporalities as shall seem fit and advisable to a majority of the ministers so convened;* and the *said ministers*, or a majority of them, so met, shall then and there *choose*, FROM THEIR OWN BODY, *certain persons*, not less than three nor more than five, WHO SHALL ASSUME THE STYLE, NAME AND TITLE, BY WHICH THEY ARE TO BE DESIGNATED AND KNOWN, and *shall certify the same*, under their hands and seals, within three months thereafter, to the clerk of the general court of the western shore, (see note *a*) who is hereby authorized and required to record the same in the records of the laws of this State, at the expense of the said *corporation*, and THEREUPON THE SAID PERSONS, AND THEIR SUCCESSORS, SHALL BE A BODY POLITIC OR CORPORATE, BY THE NAME AND DESCRIPTION SO ASSUMED BY THEM, FOR CARRYING INTO EXECUTION MORE EFFECTUALLY THE REGULATIONS AFORESAID, AND THE PROVISIONS OF THIS ACT; which said body corporate shall immediately be seized and possessed, in as full and ample manner, and of the same estate, title and interest, in law and equity, of all such property then declared in manner aforesaid to be held by any person or persons, upon the trusts and to the uses hereinbefore mentioned, or which thereafter shall be so declared to be held by any person or persons to the uses and upon the said trusts *before the 14th day of August, 1776*, or acquired since that period *by exchange for property so held*, as the person or persons making such declaration *now* hold and possess the same; and the *said property*, with the rents, issues and profits thereof, shall from thenceforth be under the *sole control and management* of the *said corporation* or *body politic*, and their successors, &c."

"§ 4. That all vacancies occasioned by death, resignation, or other disqualification, *of any person constituting the said corporation or body politic*, shall be filled and supplied, from

time to time, by other person or persons elected or appointed by the *ministers of the Roman Catholic religion* within this State, citizens thereof, *and acting agreeably to the rules and directions to be established at their first meeting* to be held pursuant to this act, or by a majority of them present at such election or appointment; and it shall and may be lawful for the *ministers aforesaid*, qualified as aforesaid, to meet as often as may be necessary for their general interests and concerns, or to fill up vacancies occasioned by death, resignation or other disqualification of any persons constituting the corporation or body politic aforesaid; which said corporation or body politic, and their successors, shall be capable of suing and being sued, impleading and being impleaded, in any court of law and equity within this State, by their corporate name, in as full and effectual manner as any other person or persons, bodies politic or corporate, may sue or be sued, implead or be impleaded."

Md. act of November, 1792, ch. 55.

Note a to § 3 thereof is as follows:

"It appears by the records of the general court office, that the persons chosen declared and certified to the clerk of said court, *that they assumed the style, name and title of* THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN."

Id., 2 Kilty's Laws of Maryland.

Thereafter the legislature of Maryland, in November, 1797, passed the statute, chapter 40, which, in § 1, recites that William Deakins, Jr., and John Threlkeld, on January 23, 1789, by a certain deed conveyed unto John Carroll, John Ashton, and Robert Molyneux certain lands in said deed mentioned, lying and being in Montgomery county, and that at the time of said conveyance it was understood between the parties thereto *that the said lands should furnish a site for the purpose of erecting a college or seminary of learning under the government and control of the Roman Catholic clergy of this State*, and that, in pursuance of such intention, the *said clergy* have from *their* funds *erected spacious buildings* upon said ground and *organized a seminary of learning* highly beneficial to many of the citizens of this State, and

that, to render the situation of the college more convenient and healthy to the *students*, the said John Threlkeld, by a certain deed dated June 15, 1796, made over unto said John Carroll, John Ashton, and Robert Molyneux a certain other piece of ground adjoining that above mentioned, and that the said John Carroll, John Ashton, and Robert Molyneux, *in order to give perpetuity to said institution*; have prayed this General Assembly that they may be *enabled* to convey said lands to THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN AND THEIR SUCCESSORS AS A BODY POLITIC, and that the prayer of said petition appears reasonable, and then enacts as follows:

"§ 2. That the said John Carroll, John Ashton, and Robert Molyneux, or the survivors of them, be authorized and empowered to execute a deed of gift, in the usual form, to the SAID CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN, AND THEIR SUCCESSORS, appointed under the act (November, 1792, ch. 55) entitled An act for securing certain estates and property for the support and uses of ministers of the Roman Catholic religion, and that upon the execution of said deed the said *Corporation of the Roman Catholic Clergymen and their successors* shall be seized and possessed of said ground, in as full and ample manner and of the same estate, title, and interest, in law and equity, as the said John Carroll, John Ashton, and Robert Molyneux now hold the same; and the said property and the rents, issues, and profits therof, shall, from thenceforth, *be under the sole control and management of the said body politic, and their successors*, so as aforesaid appointed.

"§ 3. That the Corporation of the Roman Catholic Clergymen be authorized, in behalf of the *College of Georgetown*, to receive donations from persons charitably disposed, sufficient for the maintenance and *education of 30 scholars*, provided the annual amount or product of such donations do not exceed, in any one year, the sum of four thousand dollars.

"§ 4. That all donations so made *shall be applied faithfully to the purposes for which* ALONE *they are allowed to be received*, and NOT TO ANY OTHER USES OF THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN."

Md. Act of November, 1797, ch. 40.

The Maryland Act of 1805, chapter 118 (see Maryland Laws for session beginning November 4, 1805), passed January 28, 1806, entitled "An act for the benefit of the Corporation of the Roman Catholic Clergymen, and for other purposes," first recites said Maryland act of November, 1792, and then (among other things) recites as follows:

"And whereas the aforesaid ministers of the Roman Catholic religion have, agreeably to the authority delegated by the said recited act, convened and assumed to themselves the style, name and title of *The Corporation of the Roman Catholic Clergymen*, and certified the same, under their hands and seals, to the clerk of the general court for the Western Shore, and the same hath been recorded among the records of the laws of the State:

"And whereas the Reverend James Walton, Robert Molyneaux and John Ashton by several instruments in writing, sealed with their seals, each bearing date on the 3d day of October 1793, and recorded among the records of the late general court for the Western Shore in Liber J. G. No. 3, folios 285, 286, 287, 288 and 289, by which said several instruments of writing it was, agreeably to the provisions of the said recited act declared, that all and every the property in the said instruments of writing specified, had been and was held, by the respective persons executing the same, under a confidential or implied trust, *for the use, benefit and maintenance, of the ministers of the Roman Catholic Church, now exercising their ministerial functions within the United States of America, agreeably to the rules and discipline of their Church*, and who were formerly members of the religious society heretofore known by the name of *The Society of Jesus.*"

Section 2 of this act enacts:

"That the Corporation of the Roman Catholic Clergymen is hereby confirmed under and by that name, and under the name and style of The Corporation of the Roman Catholic Clergymen shall have all the estates, rights and authorities meant to be vested in or transferred to, the corporation intended and authorized to be established under and by virtue of the above-recited act entitled, *An act for securing*

certain estates and property for the support and uses of ministers of the Roman Catholic religion, passed at November session 1792."

Section 3 of this act enacts as follows:

"The Corporation of the Roman Catholic Clergymen shall be seized and possessed in all and every the property specified in the several above-recited instruments &c. in as full and ample a manner, and of the same estate, title and interest, in law and equity, as the said several persons executing the aforesaid several instruments of writing respectively then held and possessed the same."

The Maryland Act of 1808, chapter 37 (see Maryland Laws for session beginning November 7, 1808), passed December 20, 1808, entitled "An act for the benefit of the Corporation of the Roman Catholic Clergymen," recites that said corporation are possessed of two tracts in Maryland, between which a vacancy was discovered and taken up, which vacancy was afterward purchased by Germain Barnaby Betanzey, who, by petition to the General Assembly stating the facts, prays authority to transfer his title to the same to the Corporation of the Roman Catholic Clergymen. Section 2 of this act authorizes him so to do.

The next legislation on the subject is found in the act of Congress of March 1, 1815 (6 Stat. L., p. 152), entitled "An act concerning the College of Georgetown, in the District of Columbia," which enacts as follows:

"That it shall and may be lawful for such persons as now are, or from time to time may be, the President and Directors of the College of Georgetown, within the District of Columbia, *to admit any of the* STUDENTS BELONGING TO SAID COLLEGE, or other persons *meriting* academical honors, *to any degree in the faculties, arts, sciences,* AND LIBERAL PROFESSIONS, to which persons *are usually admitted* IN OTHER COLLEGES OR UNIVERSITIES *of the United States;* and to issue, in an appropriate form, the diplomas or certificates, which may be requisite to testify *the admission to such degrees.*"

Act of March 1, 1815, ch. 70; 6 Stat. L., p. 152.

On March 2, 1833, Congress, by an act entitled "An act granting certain lots to the President and Directors of the Georgetown College, in the District of Columbia" (6 Stat. L., p. 538), granted "to *the President and Directors of Georgetown College, in the District of Columbia*," lots in the city of Washington, to the amount, in value, of $25,000, which should be selected and valued by the commissioner of public buildings, when requested by the said President and Directors; which, "when so selected and valued," should "be vested in the *said corporation*, in fee-simple, to be by them held and disposed of in the following manner; that is to say, the *said corporation*, by proper and lawful act or acts, *under their corporate seal*, shall sell and dispose of the said lots," &c., for the best price or prices they can obtain, and vest the proceeds as therein directed.

Section 3 enacted "that the proceeds of the sales aforesaid, so to be vested, shall not be otherwise used by the *said President and Directors* than as a capital, to be by them forever thereafter kept vested as aforesaid; and the dividends, or interest, thereupon accruing, shall, by them, be used and applied in the aid of the revenues of the said college to the establishment and endowment *of such* PROFESSORSHIPS THEREIN *as are now, or hereafter shall be, established* by *said President and Directors;* and to and for *no other purpose whatever.*"

Act of March 2, 1833, ch. 86; 6 Stat. L., p. 538.

No further step was made in the history of this institution until the 30th of March, 1833, when POPE GREGORY XVI issued the following decree, viz:

"*Decretal of the Sacred Congregation of the Propagation of the Faith.*

"Inasmuch as the Reverend Father John Roottaan, general in chief of the *Society of Jesus*, by his suppliant petition, has explained to our Most Holy Master, by Divine Provi-

dence Pope Gregory XVI, that the *college of the said society*, situate in *Georgetown* in North America, by a law passed at a Congress of the Confederated States in the year 1815, had been *erected into a* UNIVERSITY, *in which young men* ARE INSTRUCTED IN PHILOSOPHY AND THEOLOGY, though nevertheless that degree cannot be conferred because power to confer it has not hitherto been given by the Holy See. Moreover, it being made to appear that if such *faculty* should be granted to *Georgetown College* (similar to which formerly was granted by the briefs of Julius III in the year 1552, and of Pius IV in the year 1561,) in which it appeared, as was well known that in all colleges of that society wherein courses of *philosophy and theology* were adopted, *great benefit accrued to religion;* and especially when it should come to be known that the *Georgetown College* would be the only *university* in America with a *learned doctorate*, young *ecclesiastics* would flock to it, so that the courses of *theology*, which in their dioceses are slightly observed would then be properly performed. These things being stated by the Reverend Father in God, Castruccium Castracano, secretary of the Sacred Congregation of the Propagation of the Faith, to our Most Sacred Master Gregory XVI, with prayers, His Holiness benignly assented to confer the *faculty* of granting such degrees to the *College of the City of Georgetown of the Society of Jesus.*

"Given at Rome, 30 of March, 1833."

Rec., pp. 95, 96.

On June 10, 1844, Congress passed an act entitled "An act to incorporate Georgetown College, in the District of Columbia" (6 Stat. L., p. 912), which enacted as follows:

"§ 1. That there be erected, and hereby is erected, in Georgetown, in the District of Columbia, a college *for the instruction of youth* IN THE LIBERAL ARTS AND SCIENCES, the name, style, and title of which shall be '*The President and Directors of Georgetown College.*'

"§ 2. That James Ryder, Thomas Lilly, Samuel Barber, James Curley, and Anthony Rey, be, and they are hereby declared to be, a body politic and corporate, with perpetual succession in deed or in law, to all intents and purposes whatsoever, by the name, style, and title of '*The President and Directors of Georgetown College,*' by which name and title they and their successors shall be competent, at law and in

equity, to take to themselves and their successors, for the use of said college, any estate whatsoever, in any messuage, &c., by gift, bequest, &c., and the same to grant, &c., for the use of said college in such manner, &c., and to receive the same, their rents, &c., and to apply the same for the proper use and benefit of the said college; and by the same name to sue and be sued, implead and be impleaded, in any courts of law and equity, in all manner of suits, actions, and proceedings whatsoever, and generally by and in the same name to do and transact all and every the business touching or concerning the premises."

Act of June 10, 1844, ch. 41; 6 Stat. L., p. 912.

Such was the legislation concerning and such the history of *institutions* at Georgetown commonly called—in ordinary parlance—*Georgetown University* and *Georgetown College*; and this legislation and this history should not be lost sight of, but constantly kept in mind. I say *institutions* because said act of June 10, 1844 (6 Stat. L., p. 912), creates a separate, distinct, and different body politic and corporate (*i. e.*, "*The President and Directors of Georgetown College*") from the body politic or corporate (*i. e.*, "*The Corporation of the Roman Catholic Clergymen*") previously created by the Maryland act of November, 1792, ch. 55, *supra*, recognized by subsequent Maryland acts of November, 1797, ch. 40, *supra*; 1805, ch. 118, and 1808, ch. 37, chartered as a *university* by the act of Congress of March 1, 1815, ch. 70, *supra*, and afterwards recognized by said act of Congress of March 2, 1833, *supra*.

III.

The Maryland Declaration of Rights Adopted in 1776, as Amended by Act of Congress of July 25, 1866, Section 457, R. S. D. C.

By the 34th section of said Declaration of Rights of the State of Maryland:

"Every gift, sale or devise of land to any minister, public teacher, or preacher of the gospel as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination; every gift or sale of goods or chattels to go in succession or take place after the death of the seller or donor to or for such support, use or benefit, and also every devise of goods or chattles to or for the support, use or benefit of any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination, without leave of the legislature, shall be void and of no effect"—

unless such gifts and devises described in said provisions of the law just quoted—

"shall be made at least *one calendar month before the death of the donor or testator*" (act of July 25, 1866, ch. 237 (14 Stat. L., 232), § 457, R. S. D. C.).

Such was the law upon this subject prior to the Code.

Section 1635 of the Code is as follows:

"No devise or bequest of lands, or goods, or chattels, to any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order, or denomination, or to or for the support, use, or benefit of or in trust for any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order, or denomination, shall be valid unless the same shall be made at least one calendar month before the death of the testator" (D. C. Code, § 1635).

IV.

Ethelbert Carroll Morgan's Individual Estate.

The property owned by the said Ethelbert Carroll Morgan at his death (other than his share in his father's estate), which said Ethelbert Carroll Morgan devised and bequeathed to his said trustees, he directed in his will should be held by his trustees on the uses and trusts as follows:

"(*a.*) To apply the income and profits to the use and benefit of my sisters Eleanora Speer wife of Emory Speer and Minnie Mosher (otherwise known as Anna M. Mosher) wife of James Mosher in equal parts during their lives and at their death to deliver and convey each sister's share to her issue, and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her.

"(*b.*) And if my said two sisters shall both die leaving no issue living at their deaths I direct my said trustees to deliver and convey all the said rest and remainder of my estate (excepting my share aforesaid under my father's will) to *Georgetown University* in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof" (Rec., p. 15).

As has been already stated, said last will and testament of Ethelbert Carroll Morgan was not made *one calendar month before his death*, but was made and dated *only thirteen days prior* to his death.

First. It is submitted that the disposition of said remainder interest in the estate not derived *ex parte paterna* and designated *b* (Rec., p. 5) is, in fact, a void or lapsed disposition, because it is contrary to and within the prohibition of said thirty-fourth section of the Declaration of Rights of the State of Maryland, as amended as aforesaid, said disposition being—

To a minister, public teacher, or preacher of the gospel as such; or

To a religious sect, order, or denomination; or

To or for the support, use, or benefit of or in trust for a minister, public teacher, or preacher of the gospel as such; and being either a gift or devise of land, or a gift or devise of goods and chattels, as the case may be, to or for the same, or to or for the support, use, or benefit of or in trust for the same, contrary to the express terms and provisions of said Declaration of Rights, as so amended.

Definition of Sect.

"A body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system. Specifically: *The adherents collectively of a particular creed or confession;* a denomination; communion; as the Presbyterian *Sect;* the various *sects* of Jews, Mahommedans, or *Christians.*"

Standard Dict.—"Sect"—p. 1616.

"*A party or body of persons who unite in holding certain special doctrines or opinions concerning religion,* which distinguish them from others holding the same general religious belief; a distinct part of the general body of persons claiming the same religious name or origin; a party or faction in a religious body; a separate ecclesiastical organization; an ecclesiastical denomination: as the *sects* of the Jewish religion (which were not separately organized); the *sects* of the *Christian* Church (usually separately organized); Mahommedan *sects;* Buddhist *sects.*"

The Century Dict.—"Sect"—p. 5456.

Definition of Order.

"A class or body of persons united by some common bond and distinguished from the rest of society as having the same occupation or profession, *as subjected to the same religious rules,* or as ranking themselves together for some common ends."

Standard Dict.—"Order"—p. 1238.

Definition of Denomination.

"A sect or school having a distinguishing name, *especially a body of Christians united by a common faith and form of worship and discipline;* as, the Baptist *denomination.*"
Standard Dict.—"Denomination"—p. 490.

"A class, society or collection of individuals called by the same name; especially a religious sect; as, the Methodist *denomination.*"
The Century Dict.—"Denomination"—p. 1534.

Prior to the Maryland act of November, 1792, ch. 55, *supra*, the *ministers of the Roman Catholic religion*, in Maryland, were unquestionably *a religious sect, order, or denomination.*

Being subject to the same religious rules, and ranking themselves together for common ends, it cannot be denied that they were a *religious order.* It is equally undeniable not only that they were a *sect of Christians* or a *sect of the Christian Church*, but also that they belonged to or composed *the Roman Catholic denomination* of that church.

For these reasons they fell within the express prohibition of said 34th section of the Declaration of Rights. They obviously fell within it for the further and additional reason that they were pre-eminently and conspicuously ministers, teachers, and preachers of the gospel.

Such was their *status* prior to said Maryland act of November, 1792, ch. 55, and it is respectfully submitted that such was their *status* after the passage of that act.

Maryland Act of Nov., 1792, *ch.* 55.

By, under, and pursuant to its terms and provisions they were incorporated by the name and style of "*The Corporation of the Roman Catholic Clergymen;*" but though so incorporated, they were none the less *a religious sect, order, or denomination* after their incorporation than they were before such

incorporation. Nothing in this act of incorporation prevents their continuing to be such religious sect, order, or denomination; but, on the contrary, it is *as such religious sect, order, or denomination* that they are by the very terms of said act incorporated. This act was manifestly passed at the request or upon the application of this sect, order, or denomination. It first recites (§ 1) the holding and application of certain property, or the profits thereof, by individuals as legal proprietors thereof under a confidential trust for the "*ministers of the Roman Catholic religion*" (*i. e.*, this identical sect, order, or denomination). It then recites the provisions of the Declaration of Rights, and then recites that it is reasonable and just to grant unto said "*ministers of the Roman Catholic religion*" (*i. e.*, this identical sect, order, or denomination) "that legislative *aid*, without which *they* will be destitute of that protection and security to *their* property to which *they* are entitled *equally with every other sect or denomination of Christians.*"

Section 2 empowers and authorizes legal proprietors of property held on or before August 14, 1776, "*under a confidential trust*" for said "*ministers of the Roman Catholic religion*" (*i. e.*, this identical sect, order, or denomination), to execute a declaration of such confidential trust, with an affidavit, &c., and requires the same to be recorded.

Section 3 enacts that said "*ministers of the Roman Catholic religion* (*i. e.*, this identical sect, order, or denomination) "EXERCISING THEIR MINISTERIAL FUNCTIONS AGREEABLY TO THE RULES AND DISCIPLINE OF THEIR CHURCH," &c., shall convene, &c., and "*adopt such* REGULATIONS *for the management of their estates and temporalities as shall seem fit and advisable to a majority of the ministers so convened*" (*i. e.*, to a majority of this identical sect, order, or denomination), and "the *said ministers*, (*i. e.*, this identical sect, order, or denomination) "or a majority of them, so met, shall then and there *choose, from their own body*, certain persons," &c., "*who shall assume the style, name and title, by which they are to be designated and known*,"

and shall certify the same, &c., "and *thereupon the said persons, and their successors, shall be a body politic or corporate, by the name and description so assumed by them,* FOR CARRYING INTO EXECUTION MORE EFFECTUALLY THE REGULATIONS AFORESAID, AND THE PROVISIONS OF THIS ACT; which *said body corporate* shall immediately be *seized and possessed*, in as full and ample manner," &c., of all such property, &c., as the person or persons making such declarations now hold and possess the same; and the said property, &c., shall from thenceforth *be under the sole control and management of said corporation or body politic*, and their successors.

Section 4 enacts that all *vacancies* occasioned by death, &c., "*of any person constituting the said corporation or body politic*" shall be filled and supplied, &c., by other person or persons elected or appointed by said "*ministers of the Roman Catholic religion*" (*i. e.*, by this identical sect, order, or denomination) "*acting agreeably to the rules and directions to be established at their first meeting*, to be held pursuant to this act, or by a majority of *them* present at such election or appointment."

As stated *supra*, the corporate name assumed was that of "*The Corporation of the Roman Catholic Clergymen.*"

It is respectfully submitted that upon the very face of this statute it is self-evident that *said sect, order, or denomination* therein mentioned or referred to (*i. e., said ministers of the Roman Catholic religion*) was itself incorporated *as such* for the express purpose of enabling *such sect, order, or denomination* to become seized and possessed of, to receive, hold, manage, and enjoy, by leave of the legislature, such property as, on or before August 14, 1776, &c., had been held upon a confidential trust for *said religion, sect, order, or denomination* as aforesaid.

Notwithstanding the legislative leave contained in said Maryland act of November, 1792, chapter 55, to this incorporated religious sect, order, or denomination (*i. e.*, "The Corporation of the Roman Catholic Clergymen") to acquire,

hold, and enjoy, and to become seized and possessed of the property in said act mentioned or referred to, said incorporated religious sect, order, or denomination (*i. e.*, "The Corporation of the Roman Catholic Clergymen") still was and remained, so far as any other property was concerned, within or subject to the prohibition of said declaration of rights.

Maryland Act of Nov., 1797, *ch.* 40.

It must be because said *ministers of the Roman Catholic religion* (duly incorporated as a body politic and corporate by the style, name, and title of "*The Corporation of the Roman Catholic Clergymen*," as aforesaid) not only regarded and recognized themselves as being, but also were regarded and recognized by the legislature of Maryland as being, still a religious sect, order, or denomination, *after* their said incorporation as well as before their said incorporation, that the act of November, 1797, chapter 40, was passed to enable them, with the legislative leave therein contained, to acquire, hold, and enjoy, and to become seized and possessed of the property mentioned or referred to in that act. Upon the very face of that statute it seems to be clear that they themselves, and the legislature, and all persons interested or concerned, deemed such leave of the legislature essential under the terms and provisions of the Declaration of Rights to enable them then to acquire, obtain, hold, or to become seized or possessed of the very grounds, with the buildings erected thereon, which constitute the site of what is now commonly called "*Georgetown University.*" The act of November, 1797, chapter 40, accomplished at least two things: *First* (by §§ 1 and 2), it enabled this body politic and corporate—*i. e.*, "*The Corporation of the Roman Catholic Clergymen*"—to acquire (with this leave of the legislature) a good title to their college buildings and grounds, although (without such leave) their title thereto would have been null and void under the Declaration of Rights; and, second (by sections 3

and 4), it authorized this same corporation (*i. e.*, "The Corporation of the Roman Catholic Clergymen"), in behalf of the *College of Georgetown*, to receive donations for the "maintenance and *education* of 30 scholars," which shall be applied *alone* to that purpose, and "not to any other uses of the Corporation of the Roman Catholic Clergymen."

"The Corporation of the Roman Catholic Clergymen" (as an incorporated religious sect, order, or denomination) and its successors thus became, with the leave the legislature, lawful owners of their colleges and grounds, on the Potomac river at Georgetown (then in Montgomery county, Maryland), commonly called, even then, *Georgetown College* or the *College of Georgetown*.

And such was the *status* of this institution when the act of Congress of March 1, 1815, ch. 70 (6 Stat. L., p. 152) was passed.

Act of Congress of March 1, 1815, *ch.* 70.

It cannot be denied that the institution referred to in said act of March 1, 1815, as the "*College of Georgetown*" was the academy or college for so many years conducted and in active operation at Georgetown, duly and properly incorporated by the style, name, and title of "*The Corporation of the Roman Catholic Clergymen*," but constantly and commonly called the College of Georgetown. There was no other college at Georgetown.

This was the only institution of learning there when said act of March 1, 1815, was passed. The legislation, the catalogues, the testimony of Father Daugherty, and the history of the institution demonstrate this beyond all controversy.

The powers conferred by said act, it nominally grants to "such persons as now are, or from time to time may be, the *President and Directors* of the College of Georgetown;" but it must be remembered that the *President and Directors*, for the time being, are the principal officers of the corporation, and stand in place of and represent the corporate body; and

it is well settled that powers conferred upon the principal officers of a corporation are corporate powers or franchises of the *corporation itself.*

Nowhere is this more clearly or concisely stated than by Selden, J., in delivering the opinion of the court in the case of *West vs. Trustees of the Village of Brookport,* where he says:

"In all charters creating corporations, powers conferred upon those who stand in place of and represent the corporate body are deemed to be conferred upon the corporation itself. The cases which prove this are innumerable, and I shall assume it without further argument."

West *vs.* Trustees of the Village of Brookport, 16 N. Y., 170, note.

This proposition is so well settled that, like Mr. Justice Selden, we deem it unnecessary to cite further authority in support of it.

The powers and franchises conferred by said act of March 1, 1815, are then conferred upon said "*The Corporation of the Roman Catholic Clergymen*" (an incorporated religious sect, order, or denomination), which was a then existing body politic and corporate under its Maryland charter. Said act of March 1, 1815, empowered and enfranchised that existing corporation as a *university* or erected it into a university.

Its legal effect is to empower and enfranchise this existing corporation "*to admit any of the* STUDENTS BELONGING TO SAID COLLEGE or other persons *meriting* academical honors, to any degree in the faculties, arts, sciences, AND LIBERAL PROFESSIONS to which persons *are usually admitted* IN OTHER COLLEGES OR UNIVERSITIES *of the United States;* and to issue, &c., the *diplomas,* &c., which may be requisite to testify the admission to such degrees." Under the Maryland act of 1797, ch. 40, this corporation already had the power (§§ 3, 4) of "maintaining and *educating* 30 scholars." And under the act of March 1, 1815, the mere grant to such an institution of the franchise power to admit to such degrees and to issue

such diplomas would of itself (in the absence of anything to the contrary) carry, by necessary implication, the franchise power to teach whatever was necessary to merit the same. This statute, however (*i. e.*, the act of March 1, 1815), affirmatively confers franchise power to admit the *students belonging to said college meriting academical honors*, and other persons meriting academical honors, to such degrees and to issue to them such diplomas. Such affirmative language surely renders the legislative intent perfectly clear and distinct, for no one can doubt that this corporation was to itself teach "*the students belonging to said college*," and to teach them until they *merited* such academical honors, before admitting them to such degrees or issuing to them such diplomas as said act empowers. It certainly must have been intended by Congress that this corporation should *teach its own students*, and it surely must have been intended that whoever it admitted to degrees should *merit* such degrees; and as it is enfranchised to admit *its own students* to such degrees, it necessarily follows that, as such body politic and corporate, it "The Corporation of the Roman Catholic Clergymen" (an incorporated religious sect, order, or denomination), was by said act of March 1, 1815, empowered or enfranchised to teach whatever it was empowered or enfranchised to admit to degrees in.

By the broad terms of this statute it (*i. e.*, said corporation) is, as stated above, empowered or enfranchised to admit *students belonging to said college*, meriting academic honors, to any degree in the faculties, arts, sciences and LIBERAL PROFESSIONS to which persons are usually admitted IN OTHER COLLEGES OR UNIVERSITIES in the United States.

There can be no doubt as to what the phrase "*liberal professions*" signifies as used in this statute. A *profession* is defined as follows:

"An occupation that properly involves a *liberal* education or its equivalent, and mental rather than manual labor; especially, one of the three so-called *learned professions*.

"Nothing is more certain than the essential identity among all ancient nations of the *professions*—RELIGION, *law*, and *medicine*, which the progress of civilization has separated into three."

Standard Dict.—"Profession"—p. 1422.

"Formerly *theology*, *law*, and *medicine* were specifically known as the *professions*."

The Century Dictionary—"Profession"—p. 4755.

Undoubtedly the phrase or expression "*liberal professions*" includes *theology* or *religion* and law and medicine.

Undoubtedly on and before the passage of said act of March 1, 1815 (as an historic fact), students were admitted in other colleges or *universities* in the United States to degrees in *theology* or *religion* and in law and in medicine. Washington College, on the Eastern Shore, by its charter (see Md. Act of 1782, ch. 8, § 11), and St. John's College, on the Western Shore, by its charter (see Md. Act of 1784, ch. 39, § 15), and Du Bough's Seminary, near Baltimore, by its charter (see Md. Acts for session beginning November 5, 1804, ch. 71, § 2; passed January 19, 1805), had long before been each under its said charter empowered "to admit any of the students in the said college, or any other persons meriting the same to any degree or degrees in any of the faculties, arts and sciences, and *liberal* professions, to which persons are usually admitted *in other colleges or universities in America or Europe*."

In addition, there were colleges and universities in other States of the Union, such as "Harvard" and "Princeton."

We submit, therefore, that this institution of learning at Georgetown, D. C., from and after the passage of said act of Congress of March 1, 1815, not only was an incorporated religious sect, order, or denomination, previously incorporated by the name of "The Corporation of the Roman Catholic Clergymen," as aforesaid, but also was duly empowered and enfranchised *as such* corporation to teach religion or the gospel.

Act of Congress of March 2, 1833, ch. 86.

The act of Congress of March 2, 1833, chapter 86 (6 Stat. L., p. 538) contains additional provisions, establishing the fact that this corporation (*i. e.*, "The Corporation of the Roman Catholic Clergymen") had franchise, power, and authority as such teacher. It constitutes the legislative leave of Congress for said corporation to receive and hold the property therein mentioned or referred to for the uses and purposes therein specified. It nominally grants lots in Washington to the *President and Directors* of Georgetown College in the District of Columbia; but, as already explained (West *vs.* Trustees of the Village of Brookport, 16 N. Y., 170, note), this is in reality a grant to the corporation itself. This statute precludes all doubt upon this subject, for it expressly provides that the property when selected and valued shall be vested in the "*said corporation*" in fee simple, &c., and that the "*said corporation*" shall sell and dispose of the same, &c., and invest the proceeds thereof. At the passage of this act "The Corporation of the Roman Catholic Clergymen" was the only corporation in existence to which this language could have referred. And (§ 3) requires that the proceeds so to be invested shall not be otherwise used, &c., than as a capital, &c., the dividends or interest from which shall be used and applied in aid of the revenues of "*said college*," to the "establishment and endowment of *such professorships therein* as *are now* or *hereafter shall be*, established by said President and Directors; and to and for no other purpose whatever." Congress must have intended that this corporation should exercise the power of *teaching* when it created and authorized this endowment for "*professorships*" therein.

We respectfully submit that under and by virtue of the Maryland statutes and acts of Congress to which we have referred *supra*, "The Corporation of the Roman Catholic

Clergymen" was a duly incorporated religious sect, order, or denomination, and (so far as legislative or civil authority is concerned) said enactments duly empowered it and enfranchised it *as such corporation* to teach religion or the gospel at its colleges and grounds at Georgetown, D. C., and by the legislative leave aforesaid it was vested with and owned its said colleges and grounds at Georgetown, D. C. In the language of the Supreme Court of the United States:

"The gift of *new powers* to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such a gift is not a grant of corporate existence. It assumes corporate life already existing."

Central R. R., etc., Co. *vs.* Georgia, 92 U. S., 673.

That such was the understanding, not only of this incorporated institution itself, but also of Pope Gregory XVI, is evident from his papal decree of March 30, 1833 (Rec., pp. 95, 96).

Decree of Pope Gregory XVI of March 30, 1833.

This decree was only necessary from a religious point of view. Said corporation, as a religious sect, order, or denomination, was under the religious power of the Pope, and only from a religious standpoint needed the power from the Holy See thereby conferred.

It is to be observed that said decree of Pope Gregory XVI of March 30, 1833, expressly recites that said college of said society, situate in Georgetown, &c., by said act of 1815 "*had been* ERECTED *into a* UNIVERSITY, *in which young men* ARE INSTRUCTED IN PHILOSOPHY AND THEOLOGY." Can any one doubt that such was the case in the light of the legislation to which we have referred and of the history of this institution?

As an incorporated religious sect, order, or denomination, and as an institution duly empowered and enfranchised *as*

such corporation to teach religion or the gospel, and which, as shown by the record in this cause, actually taught the same, testators' legacies and devises to this institution are in direct contravention of said Declaration of Rights.

The courts have uniformly enforced like provisions in all the declarations of rights under the several constitutions of Maryland. In Murphy *vs.* Dallam a quarter of an acre of land was devised "to Francis Asbury for the use of the Methodist Society and a school." The court *held:*

"A devise of land to a religious sect without the leave of the legislature, in some way previously had and obtained, is void."

Bland, chancellor, saying:

"It is not shown, that this society ever obtained the *leave of the legislature*, in any manner whatever, to take or hold this property. * * * I am of opinion, that this devise must be considered as *absolutely null and void* by virtue of the 34th article of the declaration of rights."

Murray *vs.* Dallam, 1 Bland's Ch., 529.

In Grove *vs.* Trustees of the Disciples a grantor, in consideration of £100, conveyed to nine persons a piece of ground (less than two acres) in trust "for the society of German Baptists commonly called Dunkers, to and for the only proper use and behoof of the said German Baptist society forever, and to and for no other use, intent or purpose whatsoever." The court, Miller, J., says:

"Upon its face this deed is in direct contravention of the 34th article of the then Declaration of Rights. It is a conveyance of land in trust for a 'religious sect, order, or denomination.' * * * No assent of the legislature thereto is averred, nor does any such assent appear ever to have been given. Such a conveyance the article referred to declares shall be void, and the courts have uniformly enforced like provisions in all the Declarations of Rights under the several constitutions of this State."

Grove *vs.* Trustees of the Disciples, 33 Md., *454.

In State, use of M. E. Church, *vs.* Warren, a testatrix bequeathed a legacy "to the Methodist Episcopal Church at Greensborough." The court, Miller, J. say:

"Regarded as the bequest to 'any religious sect, order or denomination,' it was also void under the provisions of art. 35, of the Declaration of Rights of 1851, then in force, 'without the leave of the legislature.'"

State, use of M. E. Church, *vs.* Warren, 28 Md., * 354.

Moreover, in cases like that at bar, it is well-settled law that no charter provision which authorizes the corporation to receive, take, and hold any gift, bequest, or devise whatsoever can be construed or regarded as conferring the requisite *leave of the legislature.*

In Church Extension M. E. Church *vs.* Smith the court, Bartol, C. J., say:

"We quite agree with the complainant's solicitors in the position that the power to take and hold property to a specified amount expressed in the charters, whether the same are created by express legislative enactment, or formed under the general corporation laws, cannot be construed as a sanction by the legislature within the intent and meaning of the 38th article, conferring upon them the capacity to take under a devise or bequest.

"Such a construction would render nugatory the important and carefully considered provisions of the 38th article.

"IN OUR OPINION, THE SANCTION OF THE LEGISLATURE CONTEMPLATED AND REQUIRED BY THAT ARTICLE MUST BE EXPRESSLY GIVEN TO EACH PARTICULAR DEVISE OR BEQUEST, IN ORDER TO RENDER IT VALID. Such has been the uniform and invariable construction given to that article, *or to similar provisions in the organic law,* as is shown by the course of legislation for many years; and the question was so decided in *Orrick's case,* 49 Md., 105. This point does not distinctly appear in the opinion delivered by this court, but by reference to the record in *Orrick's case,* it will appear that '*the Lutheran Congregation of Boonsborough,*' one of the legatees in Stonebraker's will, *was duly incorporated,* and both by the acts of 1802, ch. 110, and 1815, ch. 222, and by the provisions in its charter,

was authorized to receive and hold property to a limited amount, and in its answer these provisions of law were relied on to show *a legislative sanction of the bequest*, yet it was decided that the bequest was VOID, because of the *incapacity of the corporation to take it*, there being in that case *no express sanction of the bequest by the legislature.*"

Church Extension M. E. Church *vs.* Smith, 56 Md., *392, 393 (1881).

And in the more recent case of Trustees Catholic Cathedral Church *vs.* Manning, decided in 1890, the court, McSherry, J., after referring to the cases of Orrick *vs.* Boehm, 49 Md., 85, and Church Extension *vs.* Smith, 56 Md., 392, say:

"These were cases arising under wills. In the case last cited this court said: 'In our opinion, the sanction of the legislature contemplated and required by that article must be expressly given to each particular devise or bequest in order to render it valid.'

"Devises and bequests are generally mere gratuities. Testators may be induced to make them in favor of religious sects, orders or denominations, under circumstances and conditions which suggest that such dispositions were ill judged, unwise or even the results of undue and improper influences. Such cases might arise, and that mere possibility is a sufficient reason to make it eminently just that each devise and bequest, falling within the constitutional restriction, should be subjected to a fair scrutiny by the General Assembly before sanctioning it."

Trustees Catholic Cathedral Church *vs.* Manning, 19 Atlantic Rep., 603.

Whether or not said institution of learning, incorporated as aforesaid by the name and style of "The Corporation of the Roman Catholic Clergymen," and commonly called the College of Georgetown, or Georgetown College, or Georgetown University, under the Declaration of Rights, could have become a donee or grantee, by deed *inter vivos*, under any *charter powers*, might admit of argument *pro* and *con*, and might possibly depend upon whether or not it was or was not a gratuitous donee or a purchaser for full and valuable

consideration. It is quite unnecessary, however, for us to consider those questions, for such is not the case at bar. This is not the case of an act or deed *inter vivos*, nor of a purchaser for value, but of legacies and devises under Ethelbert Carroll Morgan's last will and testament, and in such case the authorities cited above show the settled law to be that *no charter powers* constitute the sanction of the legislature contemplated and required by said Declaration of Rights, but that such sanction must be expressly given to each particular devise or bequest in order to render it valid.

Trustees Catholic Cathedral Church *vs.* Manning, 19 Atlantic Rep., 603.

Church Extension M. E. Church *vs.* Smith, 56 Md., *392, 393.

Orrick *vs.* Boehm, 49 Md., 85.

Act of Congress of June 10, 1844, *ch.* 41.

It will be observed that this act (6 Stat. L., p. 912) does not confer upon the college thereby erected (*i. e.*, "The President and Directors of Georgetown College") the broad *university powers*, which, as already pointed out and explained, were conferred upon the earlier existing institution of learning (*i. e.*, "The Corporation of the Roman Catholic Clergymen") by the Maryland statutes and acts of Congress aforesaid.

The first section of said act of June 10, 1844, erects, in Georgetown, in the District of Columbia, a college—

"for the instruction of youth in *the liberal arts and sciences.*"

The fifth section of said act provides—

"That the said corporation shall *not* employ its funds or income, or any part thereof, in banking operations, or for any purpose or object *other than those expressed in the first section of this act*" (6 Stat. L., p. 912).

Neither of these purposes (*i. e.*, "the *liberal arts and sciences*") would ordinarily be supposed to embrace the faculty of instruction in *religion* or *theology*, and no charter of a theological seminary or divinity school would be accepted by its promoters which contained no more explicit recognition of the power to confer degrees for that particular branch of study.

The term "liberal arts and sciences" has been used until it has acquired a technical sense, which is now well understood.

Definitions.

"The *liberal arts*, the higher arts, which among the Romans, only freemen were permitted to pursue, were in the middle ages, these seven branches of learning, grammar, logic, rhetoric, arithmetic, geometry, music and astronomy. In modern times the *liberal arts* include the *sciences*, philosophy, history, &c., which compose the course of academical or collegiate education. The ancients reckoned the same seven branches of learning as comprehended in the *liberal sciences*."

See *Webster's* Dictionary, titles "Art," "Science," and subtitles "*Liberal Arts*."

Similar definitions are found in *Worcester* and in the *Encyclopedic* Dictionary.

"The sciences are divisible into—
"(1) The mathematical treating of quantity.
"(2) The physical treating of matter and its properties.
"(3) The biological treating of the phenomena of life.
"(4) The anthropological treating of man, and
"(5) The theological treating of the Deity."
See Standard Dictionary—title "*Science*."

The distinction between the "liberal sciences" and "increative science" is pointed out by the same authority:

"*Liberal sciences*—A science naturally pursued for the love of knowledge, not from mercenary motives."

"*Incretive science*—Professional science, a science followed for its financial returns."

See Standard Dictionary—title "*Science.*"

The term "*liberal sciences*" is therefore applicable to such, and to such *only*, of the above as it is usual to teach youth in colleges for general knowledge as distinguished from *professional* education.

The expression "*liberal arts and sciences*" has been so used and employed in this technical sense time out of mind in charters to institutions of learning. Standing alone, it seems to be used rather in the sense in which it is defined in *Bailey's Etymological Dictionary*, 1740:

"*Liberal arts and sciences*, such as are fit for gentlemen and scholars; as mechanick trades and handicrafts are for meaner people."

With the absolute prohibition in this charter (act of June 10, 1844) against the employment by the college erected by that act of any of its funds or income for any other purpose than for the instruction of youth in the "*liberal arts and sciences*" there is absolutely no power under this charter for taking property for *professional education* such as *theology, law, medicine, or dentistry.*

In a New York case, where defendants contended that they had incorporated themselves as a medical college under the general incorporation acts, which, as amended, enacted that "Any five or more persons, &c., who shall desire to associate themselves together for benevolent, charitable, *literary, scientific*, &c., purposes, &c., or for any two or more of such objects combined, may make, sign and acknowledge" a certificate and become incorporated, &c., the court, Earl, J., said:

"We are of opinion that these acts did not authorize the formation of a *medical college.* According to the ordinary use of language, a *medical college* would not be described as a *scientific* or *literary* institution. It would not be generally

classified *as such.* * * * As we have already stated, the terms '*literary* or *scientific* college or university' do not embrace a *medical college.*"

The People *vs.* Gunn, 96 N. Y., 321, 322.

If a devise or bequest of property had been made to "Georgetown University, in the District of Columbia," at any time between 1834 and 1843, it could not have been questioned that (under said Maryland acts of November, 1792, and November, 1797, and subsequent Maryland acts, and said acts of Congress of March 1, 1815, and March 2, 1833, and said papal decree of March 30, 1833) said "The Corporation of the Roman Catholic Clergymen," with its university powers, could, as such corporation, have claimed such gift and made the claim good *except for the prohibition of the Declaration of Rights;* but it is equally undeniable that such gift would have been *null and void* because of *that prohibition.*

In the case at bar it was well said by the trial court in its opinion:

"Under the conditions then existing (prior to act of 1844), it is clear that benefactions given to the institution as then conducted would have been as fully within the prohibition of the 34th article of the Declaration of Rights as though they had been bequeathed to any of the avowed theological institutions or divinity schools in the country" (Rec., p. 101).

What was true then is equally true now.

The trial court in its opinion (Rec., pp. 101, 102) attempts to escape from this conclusion by treating the charter of 1844 as merging all prior charters, as repealing them, as obliterating them, and as leaving it, and it alone, as the only charter.

But it is respectfully submitted that such is not the case, that such contentions are untenable, and the opinion and decision of the trial court is erroneous concerning these matters.

The Corporation of the Roman Catholic Clergymen is unquestionably a mere private corporation, its original endowment and most of its subsequent endowments having come from private parties and private sources.

Society for the Propagation of the Gospel in Foreign Parts *vs.* New Haven, 8 Wheat. (S. C.), 464, 487.

Trustees of Vincennes University *vs.* State of Indiana, 14 Howard (S. C.), 269, 277.

Vincennes University was handsomely endowed by Congress, but the court *held:*

"The Board of Trustees of the University was not a public corporation. * * * The donation of land for its support was like a donation by a private individual" (*id.*, 14 Howard, 269).

"A franchise is property and nothing more."

The West River Bridge Co. *vs.* Dix, 6 How., 534.

There is no acceptance by the old corporation—*i. e.*, "The Corporation of the Roman Catholic Clergymen"—of the act of June 10, 1844. It is not a party to that proceeding. Although the persons named as incorporators in said act of June 10, 1844, may have accepted it, yet there is nothing in the record to show that the old corporation of "The Corporation of the Roman Catholic Clergymen," either before or after the passage of the said act of June 10, 1844, ever assented to it, consented to it, or in any way agreed to accept it or adopt it, or ever consented or agreed to surrender, abandon, renounce, or give up any rights, powers, privileges, or franchises under said Maryland acts and acts of Congress aforesaid; and, moreover, there is nothing to identify any of the incorporators under said act of June 10, 1844, as being members of the old corporation of "The Corporation of the Roman Catholic Clergymen"—nothing to show that the incorporators in the new corporation, or any of them, are successors to the incorporators in the old corporation.

No act of Congress could deprive said old corporation of any of its charter rights, powers, privileges, or franchises under said Maryland statutes, and Congress having reserved no right to repeal, amend, or alter the additional powers, privileges, and franchises which, by said acts of March 1, 1815, and March 2, 1833, it had conferred upon said Maryland corporation, could not, without the corporate consent of the said old corporation, repeal, amend, change, or alter or in any way destroy or affect what it had previously granted to said old corporation.

It is well-settled law that private corporations are *persons* within the two last clauses of the first section of the fourteenth article of the Constitution of the United States, which provide:

"Nor shall any State deprive any *person*, of life, liberty or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."

Charlotte, &c., R. R. *vs.* Gibbs, 142 U. S., 391.
Minneapolis Ry. Co. *vs.* Beckwith, 129 U. S., 28.
Pembina Mining Co. *vs.* Pennsylvania, 125 U. S., 189.
Providence Bank *vs.* Billings, 4 Peters, 514, 562.

In a Connecticut case the court *held:*

"A legislative act, so far as it purports to annul or impair the rights of a corporation, not a party to the proceeding before the legislature, is inoperative. The legislature has no authority so to do, and it is beyond its competency so to do."

Berlin *vs.* New Britain, 9 Conn., *181.

"A grant is a contract executed, and the property once granted cannot be resumed by the State, without the consent of the grantee. * * * The charter of a corporation cannot be revoked, or altered against its consent, unless when the power of revocation or alteration is reserved in the grant, in general laws previously passed and applicable to their incorporation, or in the constitution itself. If the State has in the mode prescribed by law granted a tract of land to an

individual for a valuable consideration, it cannot, by law, revoke the grant and resume the property; and even when taken for necessary public purposes, must pay the owner a full equivalent. The same rule applies both to the *franchises* and *property* of a corporation."

Commonwealth *vs.* Pennsylvania Canal Co., 66 Pa. St., 47.

"Charters of private corporations are regarded as executed contracts between the Government and the corporators, and the rule is well settled that the legislature cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation judicially ascertained and declared. * * * Private charters or such as are granted for the benefit of the corporators are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefit diminished or impaired without the assent of the incorporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted."

Pennsylvania College Cases, 13 Wall., 212, 214.

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

Covington, &c., Turnpike Co. *vs.* Sandford, 164 U. S., 592.

It is respectfully submitted that said act of June 10, 1844, is void and unconstitutional under article 5 of the Constitution of the United States, which provides as follows:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * *nor be deprived* of life, liberty, or *property*, WITHOUT DUE PROCESS OF LAW; nor shall *private property be taken* for public use, *without just compensation.*"

See the case of U. S. *vs.* Lee, 106 U. S., 219, 220.

In the following cases it was *held:*

"The words by 'the judgment of his peers' mean a trial by jury, and the words 'by the law of the land,' which are copied from *Magna Charta*, are understood to mean *due process of law*, according to the course and usage of the common law."

Wright *vs.* Wright, 2 Md., * 452.
Harness *vs.* C. & O. Canal Co., 1 Md. Ch., * 252.
University of Md. *vs.* Williams, 9 G. & J., * 412.
Grave *vs.* Todd, 41 Md., * 641.
2 Kent's Com., 13.

Speaking of the arbitrary deprivation of life and liberty and the arbitrary spoliation of property, the Supreme Court, speaking through Mr. Justice Field, say:

"Neither can be taken without due process of law. * * * By 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Hager *vs.* Reclamation District, 111 U. S., 708.

And in another case the same court, speaking through Mr. Justice Matthews, say:

"It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person, or a particular case, but, in the language of Mr. Webster, in his familiar defination 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the

protection of the general rules which govern society,' and thus excluding, *as not due process of law*, acts of attainder, bills of pains and penalties, *acts of confiscation*, acts reversing judgments, *and acts directly transferring one man's estate to another, legislative judgments and decrees* and other similar special, partial and arbitrary exertions of power under *the forms of legislation. Arbitrary power, enforcing* its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

Hurtado *vs.* California, 110 U. S., 535, 536.

The Supreme Court, speaking through the Chief Justice, said:

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights. * * * It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection. It is the peculiar province of the legislature to prescribe *general rules* for the government of society; the application of those rules to individuals in society would seem to be the duty of *other* departments. * * * In considering this very interesting question, we immediately ask ourselves, what is a contract? Is a grant a contract?

"A contract is a compact between two or more parties, and is either executory or executed. * * * A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. *A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to*

reassert that right. A party is, therefore, always estopped by his own grant."

Fletcher *vs.* Peck, 6 Cranch (U. S.), 135–137.

And it is respectfully submitted that this is true even *independently* of constitutional provisions.

The following authorities are directly in point upon this proposition:

"There is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power."

University of Maryland *vs.* Williams, 9 G. & J., * 408.
Hagerstown *vs.* Sehner, 37 Md., * 191.
Harness *vs.* C. & O. Canal Co., 1 Md. Ch., * 251.
Calder *vs.* Bull, 3 Dallas, 388.
Fletcher *vs.* Peck, 6 Cranch (U. S.), 135–137.
Baltimore *vs.* State, 15 Md., 469.

In the first of these cases the Maryland act of 1825, ch. 190, professed to discontinue and abolish the Corporation of the Regents of the University (which had been incorporated by the Maryland act of 1812, ch. 159), and to appoint a board of trustees composed of different persons, and to transfer to them all the *franchises* and *property* of the corporation intended to be abolished.

The court of appeals of Maryland *held:*

"3. Independently of the Constitution of the United States, and of this State, the act of 1825, ch. 190, is void as opposed to the fundamental principles of right and justice, inherent in the nature and spirit of the *social compact.*

"4. The legislature has no right, without the consent of a

corporation, to revoke or alter its charter, or take from it any of its *franchises* or *property*, &c.

"5. In this respect, if effectual, the act of 1825, ch. 190, would amount to a *legislative ouster;* a legislative judgment of dissolution, and as an exercise of a *judicial* act, &c. A sentence of ouster or of dissolution, being strictly a *judicial* act, for some imputed delinquency, which the legislature not being invested with *judicial* power, is not competent to pass without the consent of the corporation—and as such in opposition to the 6th article of the Bill of Rights, which declares 'that the legislative, executive, and judicial powers, of the Government, ought to be forever separate and distinct from each other,'—and also the 21st article of the same instrument, declaring 'that no freeman ought to be taken, or imprisoned, or disseized of his freehold, &c., but by the judgment of his peers, or by the law of the land,' and in this view of the subject is void.

"6. The acts, from which the assent of an existing corporation, to an alteration of its charter, may, *and can alone be inferred*, must be *corporate acts*, or acts of its *authorized* agents or officers."

University of Md. *vs.* Williams, 9 G. & J., 365.

Had said act of June 10, 1844, contained any language purporting to repeal, change, or alter anything in said prior Maryland statute or acts of Congress, it is respectfully submitted that for the reasons stated above it would have been null and void; but as matter of fact it contains nothing of the kind. It don't refer to prior legislation at all, and so it is confidently submitted that it is a wholly separate and distinct charter to a corporation entirely new and distinct from the old corporation.

In a similar case in Maryland it was held that the later act created a *new* corporation, and did not destroy the *old* corporation.

University of Maryland *vs.* Williams, 9 G. & J. (Md.), 365.

In a Georgia case a railroad company first obtained a charter under the general incorporation laws, and after-

wards was chartered by special act of the legislature, and the latter was *held* "a separate, independent and distinct charter," the court saying:

"We find that certain persons obtained a charter under the general railroad law, authorizing them to construct a railroad from Atlanta to Hawkinsville. * * * We think that the act of 1886 is not an amendment to the original charter of the Atlanta and Hawkinsville Railroad Company, obtained under the general law, but a separate, independent and distinct charter. The title to the act is, 'An act to incorporate the Atlanta and Hawkinsville Railroad Company, to confer certain powers and privileges on said company, and for other purposes.' The first section of the act then names the corporators; and they are *not the same altogether* as the corporators in the original act. The act further says, after naming these persons, that 'they are hereby created a body politic and corporate, under the name,' &c., and then proceeds to give them all the powers that are necessary for any railroad company whatever, the right to sue and be sued, to hold property, &c., certain persons are appointed directors to act until a regular election can be held by the stockholders, &c. This act was passed and approved in December, 1886. The legislature which passed the act adjourned in December until the summer of 1887, when the same body amended this act of the preceding session. * * * Construing these two acts together, and the phraseology of the acts, and the fact that the corporators in the original charter and those mentioned in the act of 1886 *are not entirely the same*, we conclude that these acts are *not amendments* to the charter granted under the general railroad law, *but a separate and distinct charter* granted by the legislature. If they intended to incorporate the same company as that already incorporated under the general law, they certainly attempted a very useless thing, for the general law being, &c., valid and constitutional, the statutory incorporation under it was all that was needed."

Snook *vs.* Ga. Improvement Co., 83 Ga., 66, 68, and 69.

And in a case that came before the Supreme Court of the United States the court said:

"The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders and designed to accomplish the same purposes, is not the same corporation with one in New Hampshire.

"Identity of name, powers and purposes does not create an identity of *origin* or *existence*, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both.

"*To each statute and to the corporation created by it there can be but one legislative paternity.*"

Nashua R. R. *vs.* Lowell, 136 U. S., 373.

In the case at bar the old corporation has one name—*i. e.*, "The Corporation of the Roman Catholic Clergymen"—and has its paternity, its origin, or existence in Maryland legislation, whilst the new corporation has another name—*i. e.*, "The President and Directors of Georgetown College"—and has its paternity, its origin, or existence in congressional legislation. The old has broad and sweeping university powers and franchises, whilst the new has narrow and limited powers and franchises. The scope of the one is wholly different from the scope of the other, and there is nothing showing any identity of the corporate membership of the one with the corporate membership of the other, and the membership of the one is perpetuated very differently from the membership of the other. The only conclusion that can be reached, therefore, is that these are two separate, distinct, and different corporations, which have been created and chartered as explained above.

The testator, Ethelbert Carroll Morgan, does not in his will bequeath or devise property to either of these corporations by its true and correct corporate name, yet, said old corporation had for many years been commonly called and known by the name and style of "Georgetown University" or the "University of Georgetown," and in the Catalogue 1889–'90, pp. 3 and 14 (Exhibit B), it styles itself as follows:

"Georgetown University."

"Founded 1789."

"Chartered as a University,"

"By Act of Congress, March 1, 1815."

"Empowered by the Holy See"

"To Grant Degrees in Philosophy and Theology, March 30, 1833."

"College of Medicine, Founded 1851."

"College of Law, Founded 1870."

And, as mentioned above in this Catalogue 1889–'90 (Exhibit B) under the head of "School of Medicine" (Catalogue, p. 12), the name of *Ethelbert Carroll Morgan* appears as professor of laryngology.

This was the last catalogue prior to his death, as his death is noted in the next succeeding catalogue. It is, therefore, much more reasonable to suppose that said disposition of said remainder interest in testator's estate not derived *ex parte paterna* and designated as clause *b* (Rec., p. 5) was intended for said old corporation, with its university powers and franchises, in the *medical* department, of which testator was himself a *professor*, especially as it is to be an endowment in equal shares of the literary and *medical* departments thereof, than that it was intended by him for said new corporation, which possessed no university powers and could have no *medical* department, and it is respectfully submitted that such is the case.

That there never was an abandonment by the old corporation or those in control of said university of the corporate rights of the old corporation as recognized by the Maryland acts and the acts of Congress of 1815 and 1833 is shown by their claiming existence under those acts as published in the title page of Catalogue of 1889–'90 (Exhibit B), as mentioned above.

RELIGIOUS AND DENOMINATIONAL CHARACTER OF GEORGETOWN UNIVERSITY.

That a gift to Georgetown University for endowment of its literary department would be a gift to the use of a religious sect, order, or denomination and teacher of the gospel and the doctrinal religion of a sect with the meaning of the prohibition of the Bill of Rights will be apparent from the following evidence:

"This college was the first Catholic institution of higher learning founded in the United States" (Catalogue 1889–'90, p. 14, Exhibit B).

"The course of studies at Georgetown is that generally pursued in colleges of the Society of Jesus" (Catalogue 1889–'90, p. 15).

"The special mission of the Society of Jesus is to 'teach and defend religion'" (History of Catholic Church, Noethen, p. 501).

"The only object of the society is to get a little religion into men" (testimony of Father Dougherty, Rec., p. 35)

"The Society of Jesus is a religious order, founded by Saint Ignatius, and like all orders approved and directed by the Pope" (testimony of Father Dougherty, Rec., p. 38).

"A certain portion of the Society of Jesus got together and formed this corporation" (testimony of Father Dougherty, Rec., p. 36).

From Father Dougherty's evidence it appears that the Society of Jesus is in absolute control. He testifies:

"The board of directors appoint themselves. In order to maintain the corporate existence of the college, if one man has to leave, and as Jesuits we have to leave when we receive orders, another man is elected; and the one who has to leave resigns and the new man takes his place" (Rec., p. 72).

"Of course, there are certain positions in the house, such as the president, the treasurer, and the secretary who are appointed. This is the way it is done. For instance, if a man is in bad health, who is one of the board of directors, the superior will say: 'You will have to let Father So-and-so

go at the end of the year.' I will say 'That is all right, you send me a man.' When it comes to the end of the year in July, I have a meeting of my board and this man is proposed as a member of the board. Then the man who is to be removed sends in his resignation, and that is accepted. That is the way we do it" (Rec., p. 78).

"Q. The professors and the lay brothers who assist in and about the college work are chosen by the board, as I understand it?

"A. They are chosen in part by the board. When you come to ask a big question like this, you must remember that I have to run two things. I am the rector of the religious community as well as president of the college. * * * There are so many men billeted to me, so many assigned to that community, and the superior sends those men there. Of course, I try to put the men where they will do the most good" (Rec., p. 77).

The catalogues in evidence correctly set out the practice and teaching of the college (testimony of Father Dougherty, Rec., pp. 32, 75, 76).

The Teaching.

Catalogue 1889–'90, page 18:

"RELIGIOUS INSTRUCTION.

"Religious instruction is considered of the first importance in education. *Catechism* forms one of the *regular* class recitations, and weekly catechetical lectures are attended by all. The prize for Christian doctrine is awarded to the author of the best paper upon the matter of these lectures. Further instruction is given to such as have need for it or are preparing for the sacraments.

"For the development of piety there are two sodalities, which meet weekly. All Catholic students are expected to approach the sacraments at least once a month."

Now, as to the text books taught in the so-called classical course.

Catalogue 1889–'90, page 26:

"SCHOOL OF ARTS AND SCIENCES."
"PREPARATORY DEPARTMENT."

In "Third Grammar" class and "Second Grammar" class and subhead "English," one of the text books stated to be taught is "DE HARBE'S FULL CATECHISM."

Same Catalogue, 1889–'90, page 22:

"DEGREE OF BACHELOR OF ARTS."

Freshman year, "De Harbe's Full Catechism completed."

This text book is taught as a constituent part of the college course (testimony of Father Dougherty, Rec., p. 33). It is in evidence as Exhibit K.

It is entitled:

"A FULL CATECHISM OF THE CATHOLIC RELIGION."

A most casual glance at the subjects treated in the catechism, as indicated in the statement of "contents," will show that whoever teaches it is a teacher not only of the "Gospel," but especially of the denominational doctrine of the Catholic Church.

For instance:

"Chronological succession of the popes."
"Christian doctrine."
"On faith."
"On the Apostles' Creed."
"On the Commandments."
"On the means of grace."
"On the sacraments."
"On the real presence."
"Confession."
"Indulgence."
"On the angelical salutation," &c., &c.

The context will show what FATHER DOUGHERTY said for it (Rec., p. 33), that as a catechetical exposition of the doctrines of the Catholic Church " it is one of the best."

But how can it be successfully contended, in the face of this, that the institution is not a teacher of the gospel, and that a gift to it would not be for the benefit of a denomination or sect?

Again (Catalogue 1889–'90, pp. 22–23):

FOR DEGREE OF BACHELOR OF ARTS.

Under subhead " English " the course of study prescribed embraces:

" Doctrinal exposition of religion:

" Church history lectures based on Noethen."

The text book so taught (testimony of Father Dougherty, Rec., p. 32), " HISTORY OF THE CATHOLIC CHURCH—NOETHEN " is in evidence as Exhibit " J."

An examination of its contents will show that it is a complete exposition of the history and doctrines of the Catholic Church from the standpoint of that church, more complete than any priest could make from a pulpit.

From the opening chapter on " THE PROGRESS OF THE GOSPEL " to the concluding chapters on the doctrines enunciated by the great church councils, it is essentially a teaching of that religion.

Again (Catalogue 1889–'90, p. 78):

" UNDERGRADUATE SCHOOL."

One of the prescribed text books on Christian doctrine is " THE HAND BOOK OF THE CHRISTIAN RELIGION," by Wilmer, S. J., for both junior and senior years.

It is in evidence as Exhibit " L."

FATHER DOUGHERTY testified as to it (Rec., p. 34) as follows:

"That is the book taught in the upper classes, as it is more scientific in its character, not of a catechetical form, but the regular theological form."

No one can examine this text book and say that theology, and especially Catholic theology, is not taught in the so called classical courses of Georgetown University.

Again (Catalogue 1889–'90, p. 51):

Under head of the "GRADUATE SCHOOL" it is stated:

"*Students for the church can extend and complete the philosophy they have begun in their last college year,* and thus prepare the main requirements for entrance into theology."

If a gift to this college for teaching would not be a gift for the use and benefit of a religious sect, order, or denomination and teacher of the gospel as such when the testator had these catalogues open before him, it is difficult to imagine a case where any institution would fall within the meaning of the prohibition.

The effort is made in this case to limit the meaning of the statute to schools of theology strictly so called—that is, to schools of divinity engaged in teaching persons to become clergymen, a limitation wholly unwarranted either by the text or remedial nature of the statute.

SCOPE AND EFFECT OF 34TH SECTION OF BILL OF RIGHTS.

Construing the 34th section of the Bill of Rights, the supreme court of Maryland held:

"That the power to take and hold property by gift, grant, devise or otherwise expressed in the charter of a religious corporation did not extend to relieve it from the provisions of the Bill of Rights."

Church Extension M. E. Church *vs.* Smith, 56 Md., *392, 393.

Trustees Catholic Cathedral Church *vs.* Manning, 19 Atlantic Rep. (Md.), 603.

In earlier pages of this brief this point is elaborately considered and cases establishing it are quoted from at considerable length.

Much less could a gift for such purpose, to be received and administered by a corporation *ultra vires* its charter, escape the knife of the statute.

The history of the statutes similiar to the 34th section of the Maryland Bill of Rights, and the liberal construction uniformly given them to effect the object aimed at, is given in Price *vs.* Maxwell, 28 Pa. St. Rep., 33.

The courts go behind corporate charter cloaks to determine from the facts whether the gift is for the benefit or in ease of a religious order, denomination, or teacher of religion.

Idem.

Stile *vs.* Halleck, 16 Nevada, 373.

Coates *vs.* Campbell, 37 Minn., 501.

Cook Co. *vs.* Industrial School, 125 Ill., 541.

Louisiana Annual, &c., *vs.* New Orleans, 50 La.

Boyer *vs.* Christian, 69 Mo., 492.

The stated reading of the Bible in a public school renders it a place of worship within the provision of the constitution of Wisconsin. The use of the Bible as a text book and the stated reading thereof in the public schools without restriction is sectarian instruction.

State *vs.* District Board, 7th L. R. A., 330 (Wis.).

If an unascertainable portion of a fund be given upon a void trust, and the residue upon a valid trust, the whole fails.

Kelly *vs.* Nichols, 17 R. I., 323.

The reason of the rule stated.

De Camp *vs.* Dobbins, 29 N. J. Eq., 46.

The purpose of the act of Congress of 1866 (sec. 457, R. S. Dist. Col.), in keeping of force this section of the Bill of Rights, is manifest.

It is the expression of a public policy, a remedial statute intended to prevent the diversion of a man's property to religious uses when facing an approaching end and all earthly ties and affections are dwarfed, and the claims of religious associations, however delicately asserted, assume an overpowering influence over the mind.

It is a remedial statute, and as such must be construed liberally to effect the object aimed at and to prevent the evils (from a public-policy standpoint) which the statute was intended to cure:

"Thus the mortmain act, which prohibits the disposition of lands to a charity by other means than by a deed executed a year before the donor's death, was open to the construction that it applied only to lands which passed by deed, and therefore not to land of copyhold tenure. But as the object of the statute was, manifestly, to include all lands of whatever tenure in its prohibition," it was held to apply to lands conveyed by copyhold tenure.

Endlich on the Interpretation of Statutes, sec. 111; Doe *vs.* Waterton, 3 B. & A., 151.

But here where the testator must be presumed to have had full knowledge of the religious teaching, practice, and purpose to which the devise would be applied in the so-called literary or classical department of the university, and the gift being for such teaching, it is clearly not only within the spirit, but also within the letter of the prohibition.

ENDOWMENT FOR THE MEDICAL DEPARTMENT.

The bequest in clause (*b*) of the remainder interest in the testator's individual estate is to "Georgetown University" * * * "to be an endowment in equal shares of the literary and medical department thereof."

Aside from the uncertainty existing as to who or what was intended to be the beneficiary of this remainder interest, if it should be admitted for the sake of the argument that the persons acting for the time being as the President and Directors of Georgetown College were intended to handle the fund, still the gift for endowment of the medical department was not for their use, nor for the use of the institution chartered in 1844 exclusively for a literary college.

Church Ex. M. E. Church *vs.* Smith, 56 Md., 397.

The beneficiary would be either a medical college operated without any charter, or to the "Society of the Medical Department of Georgetown University," an institution chartered and operated for gain by the professors and incorporators thereof and a society whose charter has lapsed and which has abandoned the operation of the college.

The supreme court of Massachusetts held:

"A legacy to a medical institute already in existence, but a private pecuniary enterprise is not a bequest to a public charity, and in case the beneficiary ceases to exist before the will take effect, the court will not apply the gift *cy pres*."

Stratton *vs.* Physio-Medical Inst., 148 Mass., 505; 5 L. R. Anno., 33.

"A bequest to a Sunday school to be used in making Christmas presents is not a charitable bequest."

Goodell *vs.* Union Ass., 29 N. J. Eq., 32.

"The court will not presume a public charitable use where none was declared although the bequest was to the trustees of a religious society."

2 Pomeroy's Eq. Jur., 1019, note and cases cited.

"According to the uniform course of decisions in this State (Maryland), a trust cannot be upheld unless it be of such a nature that the *cestui que trusts* are defined and capable of enforcing its execution by proceedings in a court of chancery."

Church Ex. M. E. Church *vs.* Smith, 56 Md., 397.

Accordingly it was held in that case—

"That a bequest to a Church Extension Fund, a corporation, to be used as part of the Perpetual Loan Fund, as the said fund consists of a fund to be loaned to necessitous churches, the bequest becomes a gift, not to the corporation for its own use, but to it as trustee for this class of indefinite beneficiaries. And that a bequest to an unincorporated association is void as there is no *cestui que trust* who can enforce its execution in equity."

Idem.

While the rule is different in some other States when the gift is for a strictly charitable use, we know of no exception to it where the beneficiaries do not fall within that class.

"So a trust for benevolent purposes was not sustained, as benevolence may or may not be charitable in the law."

2 Perry on Trusts, sec. 711.

James *vs.* Allen, 3 Mer., 17.

Norris *vs.* Thompson, 19 N. J. Eq., 311.

"For the same reason where a bequest was made to the Bishop of Durham in trust for such objects of benevolence and liberality as he should approve, the court held that the fund could not be administered as a charity, and ordered it to be paid over to the next of kin. These cases all proceed upon the maxim, that the trust to be valid must be under control of a court, and the trust must be of such a nature that its administration can be reviewed."

2 Perry on Trusts, sec. 711.

Morice *vs.* Bishop of Durham, 9 Ves., 399; 10 Ves., 522.

Lord Brougham states the distinction in those jurisdictions where the doctrine of charitable uses is recognized thus:

"If the intention be charity, the court will execute it however vaguely the donor may have indicated his purpose. But mere purposes of a kind generally beneficial, as of those of benevolence or liberality without specifying the objects who

are to receive and those objects not being the poor, the court will never attempt to execute."

Att'y General *vs.* Haberdashers Co., 1 Myl. & K., 428.
2 Perry on Trusts, sec. 712, note.

The "Medical Department," the beneficiary, not being an incorporated institution, or if an incorporated institution its charter having lapsed, and the use not being a charity, the devise must fail.

If the bequest be considered as one for the company of the Medical Department of Georgetown University, and if that be a charity, when they allowed their charter to lapse there was a resulting trust in favor of the testator's heirs-at-law and next of kin.

Easterbrook *vs.* Tillinghast, 5 Gray (Mass.), 17.

The bequest is not only indefinite as to its objects and uncertain as to the beneficiary, but the claimants before the court as the beneficiary are persons claiming to be the successors under a charter which provides for no such use.

"If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee although the bequest is to a public charity."

Stratton *vs.* Physio-Med. Inst., 148 Mass., 505.

"Where the gift even to a charitable use is so indefinite as to be incapable of being executed by a judicial decree the gift is void."

People *vs.* Powers, 147 N. Y., 104.

We insist, therefore, that the devise in clause (*b*) of the will for the use of the Literary Department of Georgetown University is void because it was and is teaching religion within the meaning of the prohibition of the Maryland Bill of Rights. And the devise for use of the medical department is void for uncertainty as to the beneficiary, and be-

cause it is a devise for the use of an unincorporated institution not a charity.

We insist also that the devise for use of the "Literary Department of Georgetown University" is void for uncertainty and because the "Literary Department," as known to the testator, neither by its teaching, its practice, nor by legal succession can be identified with the corporation chartered in 1844 under the name of "The President and Directors of Georgetown College."

If the endowment of the medical department be construed to be a gift to the "university" recognized as a corporation by acts of Congress of 1815 and 1833, it would be void as a gift to "The Corporation of Roman Catholic Clergymen" for the reasons stated in prior pages of this brief. Even the law and medical departments are taught for the purpose of inculcating certain sectarian doctrines.

See testimony of Father Dougherty, Rec., 37.

Lapsed Residuary Legacy and Devise.

The devise and bequest in clause (*b*) of the will, if void being in the residuary clause relating to testator's individual estate, pass to his heirs-at-law and next of kin—that is to say, the real estate passes to the heirs-at-law and the personal property to the next of kin.

1 Perry on Trusts, secs. 160, 160*a*.

That Father Dougherty makes in his testimony a distinction between the "college" and the university is shown by a correction he made to his testimony (Rec., 75), as follows:

"What I wish to add to this is, in the answers I exclude the medical and law schools. This applies merely to the *college proper*."

But what of the "college improper," viz: The medical school (the one commenced to be operated after testator's death and after the lapse of the charter of the Society of the

Medical Department), the dental school, the law school, and the religious teaching and practice carried on as an indispensable adjunct to the admission of any student to any degree in the classical course—are these thus done as *ultra vires* acts of the corporation of 1844, as held by the court below?

We insist they are acts, *intra vires*, "The Corporation of Roman Catholic Clergymen," recognized as a corporate university by the acts of Congress of 1815 and 1833, under which acts the university claimed to exist in the catalogue issued for the very year 1889–'90 of testator's death. There has never been any acceptance of the new charter as repealing the old charter by the old corporation, which is essential to give it such effect.

Regents vs. Williams, 9 Gill and J., 365.

"Their act will be referred to their genuine authority and not to the new charter."

Idem, 423.

No deed of conveyance is shown transferring to the purely secular corporation created by act of 1844 the property held by the old corporation for religious teaching, nor the property granted to the latter by the act of Congress of 1833. Certainly the act of 1844, creating a new secular school, cannot be held *ipso facto* to have destroyed the trusts for religious uses held by the old corporation. The old corporation must be presumed as matter of law to be still holding its original property for the same religious and pious uses in teaching as ever. And as matter of fact the evidence is overwhelming that at the time of the will those in charge of said institution were faithfully administering that trust for religious uses, under claim in right of the corporation recognized by the act of Congress of 1815.

The mere fact that the claimants to the legacy, in order to avoid the effect of the thirty-fourth section of the Bill of Rights, claim or would like to claim under the limited

charter of 1844, and do not claim under its university charter recognized by the acts of Congress of 1815 and 1833, cannot affect the question, since the gift was to "the university."

It was well ruled in the court below in its opinion (Rec., p. 101) that—

"Under the conditions then existing (prior to act of 1844), it is clear that benefactions given to the institution, as then conducted, would have been as fully within the prohibition of the 34th article of the Declaration of Rights as though they had been bequeathed to any of the avowed theological institutions or divinity schools of the country."

Yet no difference is shown in the conduct and teachings after 1844 from what it was before.

To avoid the force of these facts, the court below held, as we think, *erroneously*, that the charter of 1844 repealed by implication the corporate powers for religious teaching existing in the old institution. It is stated in the opinion (Rec., p. 102):

"For as its only legislative charter of 1844 must have superseded all antecedent inferior authorizations to the institution, it became and still remains the only law controlling the subject."

The court then holds that even if the institution were a public teacher of religion in fact, that its conduct in that particular would be *ultra vires* the charter of 1844, and on authority of Bradfield *vs.* Roberts, 175 U. S., 291, it erroneously, we think, concludes that such state of facts could not be inquired into in these proceedings so as to affect the result.

Case Distinguished.

The case at bar is to be distinguished from the case of Bradfield *vs.* Roberts, 175 U. S., 291, in the following important particulars:

(1.) A different statute, as creating a public policy, is invoked in the case at bar, viz., that comprised in the Bill of Rights, as amended by section 457 of the Revised Statutes of the District of Columbia. A statute which is intended to protect those who have natural social claims upon a person's bounty from the undue influence, through fear or through hope of reward in the next world, which denominational religion may have over the mind of such person when the end of life is at hand. In the Bradfield case the only question was whether the making of a contract by District of Columbia Commissioners with a hospital operated by persons of Roman Catholic faith, for the nursing of the sick, was equivalent to a law by Congress "establishing" the Roman Catholic religion, in contravention of the first amendment to the Constitution.

(2.) In the Bradfield case there was a contract for the specific purpose, and no other, of nursing the sick, and made with and in the chartered name of the Providence Hospital, a corporation chartered for the especial purpose of nursing the sick, and no other.

While in the case at bar:

There is no bequest in name to "The President and Directors of Georgetown College," the corporation chartered in 1844. Nor does the evidence indicate that the testator had that charter in his mind. On the contrary, the bequest was to the "University of Georgetown," an institution which was being operated in fact, and which at the time the will was made was claiming to exist under a Maryland charter with university powers and franchises granted it by Congress in 1815.

Nor was the bequest limited to the specific purposes for which the charter of 1844 was granted to "The President and Directors of Georgetown College." It was in fact partly for the endowment of the "Medical department" of the "University of Georgetown."

(3.) In the Bradfield case the court said:

"There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree."

In the case at bar:

The evidence is conclusive that the "Literary department" of "Georgetown University" as testator knew it, and which as he knew it was the object of his bounty, was not in fact operated within the limits prescribed for the institution chartered in 1844, but was in fact being operated as a denominational and religious school, and claiming a right to do so, not under the charter of 1844, but under a Maryland charter, and a religious charter granted by the Pope in 1833, and under the claim that university powers had been granted it by Congress by the act of 1815.

While it is true that the institution does not confine its educational work to members of the Catholic Church, the catalogues in evidence show that it is a *prescribed rule* that no student in the literary or so-called classical department can obtain a college degree without taking a course in what is called "philosophy," degrees in which were authorized by the charter of the Holy See in 1833, and which is a protracted course, through text books and by lectures, in the doctrinal religion of the Catholic church. It is also prescribed that every inmate of the college must personally attend the public exercises of that religion; so that, as a matter of fact, every graduate from the literary department must have become

educated both in the doctrines and in the practice of that church, whether he has become a Catholic in faith or not.

The question in the case at bar is whether the bequest is to a teacher of religion as such, or for the benefit of a religious sect, denomination, or order. There was no such question in the Bradfield case.

In the Illinois case—

The charter of the Industrial School was held to be regular, and the purposes expressed in the act under which it was chartered secular only. The school was in fact under control of sectarian societies, and sectarian doctrines were taught, as in the case at bar. Under a county appropriation such industrial schools were entitled to so much from the county for each scholar taught. The county's defense was the constitutional prohibition against use of public funds for religious or sectarian purposes. The contention was set up, as it is in the case at bar, that if the Industrial School in its teaching violated its charter only the State could interfere by *quo warranto* or *sciere facias*. The court in overruling this contention said :

"The defense is grounded more upon this constitutional prohibition as controlling the defendant in the suit than upon such want of power or abuse of power as affects the position of the plaintiff in the suit."

So, in the case at bar, the prohibition controls the power of the testator to make a valid devise to be used for such purposes, and the principles invoked by the defense do not apply.

Cook Co. *vs.* Industrial School, 125 Ill., 541–564.

V.

Ethelbert Carroll Morgan's Share in His Father's Estate.

Clause (c) of the Will.

The devise and bequest to his trustees named in the will of his share in his father's estate to be held on the uses and trusts as follows:

"(c.) To pay and see to the application of the sum of ten thousand dollars ($10,000.00) to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan fund."

We insist the above bequest is void for the following reasons:

(1.) Because said will, gift, and devise was not made at least one calendar month prior to the death of the testator.

(2.) Because there is no chartered power in any institution which could take under the name of Georgetown University, authorizing it to prosecute such research and obtain and preserve such archives and papers.

(3.) Because the nature of the research, its object, and the character of the archives and papers are too indefinitely and vaguely stated.

(4.) Because the trust would not promote or attain a charitable or eleemosynary end.

(5.) Because the trust was not intended to be an executed one on the payment of the stated sum to the university, but

was a continuing trust, in which the application of the fund was left to the personal discretion of his trustees, and the power has lapsed, if it ever was effective, by reason of the death of one original trustee and resignation of the other.

If this clause be construed to be a gift to "Georgetown University" for the general purpose for which the present claimants seem to contend (Rec., p. 74)—that is to say, to equip and educate some professor until he became wise in the colonial history of Maryland, being a gift to a Catholic university—it would fall within the prohibition of the Bill of Rights for the same reasons elaborated under clause (*b*). We do not think, however, that this is a gift to the university as the beneficiary at all.

Church Ex. M. E. Church *vs.* Smith, 56 Md., 397.

While the sum of $10,000 is to be paid to the university, his named trustees are to see to the application of it for the sole and specific purpose of

"an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto."

There is no provision here for the establishment of a library for the benefit of the public, nor provision for the public circulation of the matter collected. At best, it is a provision for the establishment of private archives which might or might not be beneficial to the public or to particular individuals according as the custodian should or should not allow access thereto. There is absolutely no beneficiary who could come into court and complain of a diversion of the fund from the specific purpose stated, and the use is not charitable within the meaning of the rule.

Where a gift was to maintain a house for entertaining members traveling to attend meetings of the Society of Friends, the supreme court of Rhode Island (1892) held the gift not a charity and said:

"If the gift be not a charitable use, the court cannot make it such simply because it sees the testator hoped its effect would be to accomplish a charitable end."

Kelly *vs.* Nichols, 17 R. I., p. 320; 17 & 18 R. I. (1892); 19 L. R. Ann., 413.

"A bequest to a law library which has no corporate existence but which was established and maintained by fines, etc., to be paid to a committee appointed by the court is a bequest to a mere inanimate thing having no capacity to receive a gift and is void."

Craig *vs.* Lill (Pa.), 7 Cent. Rep., 659; 19 W. N. C., 375.

"A bequest to a Sunday school to be used in making Christmas presents is not a charity."

Goodell *vs.* Union Ass., 29 N. J. Eq., 32.

"The court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society."

2 Pomeroy's Eq. Jur., sec. 1019.

Corporation of Gloucester *vs.* Wood, 3 Hare, 131–136–148.

"The doctrine of *cy pres* does not apply to a bequest which is not a charitable use."

Kelly *vs.* Nichols, R. I. (1892); 19 L. R. Ann., 413; 18 R. I., 67.

A gift to a specific object of charity that fails, where there is no general charitable intention, cannot be applied *cy pres*, even in those jurisdictions where that doctrine is applicable,

Att'y Gen'l *vs.* Oxford, 1 Bro. Ch., 444, note.
Anonymous, 2 Freem., 261.
Att'y Gen'l *vs.* Whitely, 11 Ves. Jr., 251.
Cherry *vs.* Mott, 1 Myl. & C., 123.
Clark *vs.* Taylor, 1 Drew, 642.
Fish *vs.* Att'y Gen'l, L. R. Eq., 521.
Carter *vs.* Balfour, 19 Ala., 814.
Russell *vs.* Kellett, 3 Smale & G., 264.
Sinnett *vs.* Herbert, L. R., 7 Ch., 232.
Re White's Trust, 55 L. J. Ch., N. S., 701.
Lechmere *vs.* Centler, 24 L. J. Ch., N. S., 647.

"If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee although the bequest is to a public charity."

Stratton *vs.* Physio-Med. Inst., 148 Mass., 505.

So in the case at bar, even though the money is directed to be paid over to Georgetown University, and if that be considered as a charitable institution, still if the purpose to which it is to be applied is not charitable within the meaning of the rule, and that purpose fails for want of a designated beneficiary capable of applying to a court of equity to enforce the trust, the bequest must fail.

"To be a valid trust there must be persons who can prove to the court their undoubted right to the uses of the trust, or objects named of a tangible nature which can be assisted;

otherwise it could not determine who could complain of a breach of the trust, or enter a decree for its performance."

Cloyne *vs.* Young, 2 Ves. Sr., 91.
Robinson *vs.* Waddelow, 8 Sim., 134.
Knight *vs.* Knight, 3 Beav., 148, 174.
Williams *vs.* Kershaw, 5 Clark & F., 111.
Kendall *vs.* Granger, 5 Beav., 300.
Nichols *vs.* Allen, 130 Mass., 211, 218.
M. E. Church Ex. *vs.* Smith, 56 Md., 362.
Grimes *vs.* Harmon, 35 Md., 221, 226.
Heiss *vs.* Murphey, 40 Wis., 276.
Goddard *vs.* Pomeroy, 36 Barb., 548, 555.
Gumble *vs.* Pfluger, 62 How. Pr., 118.

This was also the rule laid down by the Supreme Court of the United States in—

Trustees of Phil. Baptist Ass. *vs* Hart, 4 Wheat., 1.

The rule has since been reviewed by the Supreme Court of the United States, and modified only to the extent that gifts strictly *to charitable uses are to a certain extent excepted* from its operations.

Ould *vs.* Washington Hospital, 95 U. S., 303.

In that case a bequest to trustees for a hospital to be afterwards chartered was held good by way of executory devise to charitable uses.

To the same effect were the cases of—

Russell *vs.* Allen, 107 U. S., 163.
Jones *vs.* Habersham, 107 U. S., 174.

There is nothing, however, in these cases modifying, except for charitable devises, the rule previously laid down, that the bequest fails where there are not designated beneficiaries, capable of coming into court and complaining should there be a diversion of the fund from the object limited in the bequest.

In the last-mentioned case there was a bequest in trust by name to the "Georgia Historical Society," an incorporated society chartered for the purpose of "collecting, preserving and diffusing information relating to the history of Georgia in particular and American history generally." The bequest was to keep the building as a *public* library and academy of arts and sciences, to be kept open *for the use of the public*, and a fund was also devised to equip it.

This was sustained as a good charitable devise.

There is a vast difference between that case and the case at bar.

There the trustee was an incorporated society, and the trust was germane to its general purposes. Moreover, it was a bequest for public use—a public library and academy, a public charity—while in the case at bar the public have no share in it and the beneficiaries are not named. The prosecution of research and the acquisition and preservation of archives relating to the colonial history of Maryland is all that is provided for.

A bequest was held not a charity and void for uncertainty:

"For the purchase and distribution of such books as may have a tendency to promote the interest of virtue and religion and happiness of mankind."

2 Perry on Trusts, sec. 713.
Brown *vs.* Yeal, 7 Ves. Jr., 50, note.
Briggs *vs.* Hartley, 19 L. J., Ch. N. S., 416.

"It will further be seen that the word 'charity' has obtained a signification in law; and that courts do not uphold or administer trusts for particular purposes which are not charitable within the meaning of the law, nor trusts expressed in general words which do not come within the legal signification of the word charity."

2 Perry on Trusts, sec. 709.

Lapsed Legacy Falls into Residuary Clause.

If the bequest of money in clause (*c*) fails, it being a part of testator's share of his father's estate, it falls into the residuum clause (*i*) dealing with that estate.

1 Perry on Trusts, sec. 160, 160 (*a*).

VI.

Clause (*d*) of the Will.

The bequest to testator's trustees named in the will of—

"(*d.*) A sum *not to exceed* five thousand dollars (5,000) to be applied and expended under the personal supervision of his trustees to the purchase and erection of a chime of bells and either a side altar or memorial window for some one Catholic church, said church to be in the District and to be designated by his mother by her last will or otherwise," is void,

"(1.) Because no particular church is named.

"(2.) Because his mother died without naming any particular church.

"(3.) Because a gift or devise to a church, if any particular corporation were named, would be a gift or devise for the support, use and benefit of a religious sect, order and denomination and be a devise that was not made more than a calendar month prior to the death of the testator.

"(4.) That the devise was not of any particular sum, and the amount to be applied as well as the manner of its application and selection of the church was left to the personal discretion of the trustees named in said will, one of whom is dead and the other has resigned, and the power to designate the sum to be used, the church to be benefited and the manner of its application was a personal power which ended with the death and resignation of said trustees as aforesaid."

(1.) No particular church was named as the beneficiary, and the testator left it to his mother to designate one.

"A clause in a will which is in effect a mere authority to a third person to direct how a specified sum shall be dis-

posed of is inoperative and the sum named therein being a void bequest falls into the residue of the estate."

Bristol *vs.* Bristol, 53 Conn., 242.

(2.) But in any event the mother having died without exercising the power, the bequest lapsed.

Gamble *vs.* Trippe, 75 Md., 252.

Fontain *vs.* Ravenel, 17 How., 382.

(3.) This is a gift for improvement of a Catholic church.

"The term 'church' imports an organization for religious purposes, and property given to it *eo nomine*, in the absence of any declaration of trust or use, must necessarily imply and intend to be given to promote the purposes for which a church is instituted, the most prominent of which is public worship."

Baker *vs.* Fales, 16 Mass., 495.

Such a gift to the Catholic Church must necessarily be a gift for the use or benefit of that particular denomination or religious sect, and void under the provision of the bill of rights in force in the District of Columbia.

(1.) Because there was no particular sum donated, but the amount to be used and its expenditure was left to the personal supervision of his trustees named, one of whom is dead and the other resigned. The $5,000 was only named as a maximum limit, but the amount to be used was (within that limit) a matter left wholly to the discretion of trustees no longer capable of exercising it. That a real discretion was intended to be vested in the trustee by the testator as to fixing the amount which should go under the contingent bequests made in clauses (*d*), (*e*), (*f*), and (*g*), and that the words used, "*not to exceed* five thousand dollars" were not intended to mean "five thousand dollars," is shown by the following considerations:

(*x*.) The objects of the gifts in clauses (*d*), (*e*), and (*f*) were left to the caprice or choice of his mother or of the named trustees, and the cost of the things stated would necessarily depend upon how that choice was exercised. And as the gift in clause (*g*) was contingent on a failure of clauses (*d*), (*e*) and (*f*), testator used in that clause the same language fixing an uncertain amount to be determined on the same discretion.

(*y*.) On the other hand, the gift of $10,000 in clause (*c*) and $5,000 in clause (*h*) were of fixed and definite sums.

"If the sum to be given to a charitable use be left blank or uncertain the trust will fail. As where £6,000 was given for a hospital to increase till it amount to —— for supporting —— boys."

2 Perry on Trusts, sec. 714.

Citing:

Ewen *vs.* Bannerman, 2 Dow & Ct., 74.
Flint *vs.* Warren, 15 Sim., 626.
Second Cong. Society *vs.* F. C. Soc., 14 N. H., 315.
Russell *vs.* Jackson, 10 Hare., 204.
Coxe *vs.* Bassett, 3 Ves., 155.
Hartshorn *vs.* Nichols, 26 Beav., 58.

Where a bequest was to testator's mother to use whatever portion she pleases, on condition that she make a will leaving whatever portion she does not use to certain charitable objects, it was held that the trust in favor of the charitable objects failed for uncertainty of amount donated.

Mills *vs.* Newberry, 112 Ill., 123.

"To constitute a valid trust, undoubtedly three circumstances must concur: sufficient words to raise it, a definite subject and a certain or ascertained object."

Sir Wm. Grant in Crawis *vs.* Colman, 9 Ves., 323.

"Charitable trusts are further distinguished from ordinary trusts by the uncertainty of their beneficiaries. Such uncertainty does not cause a charitable trust to fail."

5 A. & E. Ency. Law, p. 905.

"This statement is to be understood, however, as referring to the uncertainty of the individuals to which the bequest is made, and not to the certainty of a class of individuals from which the beneficiaries shall come."

Idem, p. 905.

VII.

Clause (*e*) of the Will.

"(*e*.) And if his mother fails so to [illegible] directs his trustees to donate the same to [illegible] some charity giving a preference if there be one [illegible] by the Jesuits."

This clause is void for each of the reasons given under the preceding paragraph, and for the additional one:

(1.) The trustees named having no longer the power to execute the personal discretion vested in them, one being dead and the other resigned, the trust is not capable of being executed.

This is the precise question settled in—

Fontain vs. Ravenel, 17 How., 369–382.

And to the same effect:

Gamble vs. Trippe, 75 Md., 252.

Where under a will the trustees were to select the beneficiaries from the charitable institutions of two States, the court said:

"If they refuse to execute it or the power remains unexecuted it is not apparent how the court could make a selection. * * * Neither could the court select individuals to perform a duty devolving upon the trustees, who are

selected no doubt by reason of personal confidence in their judgment and their capacity for the task imposed."

Pritchard *vs.* Thompson, 95 N. Y., 76.

VIII.

Clause (*f*) of the Will.

"(*f*.) And if the foregoing gift be void he directs said sum not exceeding $5,000 shall be equally divided between St. Vincents and St. Josephs Catholic Orphan Asylums in the city of Washington."

(1.) This clause is void because no definite amount is named. It was only to be such an amount as his trustees named exercising the discretion reposed in them personally might have expended, for a chime of bells, side altar, and memorial window of an undesignated church.

The authorities cited under the two preceding paragraphs are equally applicable to this.

"Whenever a power is of a kind that indicates a personal confidence it must *prima facie* be understood to be confined to the individual to whom it is given, and will not except by express words pass to others to whom by legal transmission the same character may belong."

Cole *vs.* Wade, 16 Ves. Jr., 27.
Alexander *vs.* Alexander, 2 Ves. Sr., 643.
Powles *vs.* Jordan, 62 Md., 503.
Gamble *vs.* Trippe, Ind., 15 L. R. Ann., 235.
Att'y Gen'l *vs.* Berryman, 1 Dickens, 168.

(2.) There are no asylums in the city of Washington having the corporate names used in the will. What makes it clear, however, that the testator intended the corporations chartered as "St. Vincent's Orphan Asylum" and "The Trustees of St. Josephs Male Orphan Asylum" is the descriptive words used by the testator "*Catholic* Orphan Asylums."

It is in evidence that these two institutions are operated under the auspices of the Catholic Church (Rec., p. 39).

Their charters are in evidence and show that they organized as *private* charitable and educational institutions. The documentary evidence (Rec., pp. 43–45) shows that St. Joseph's was organized by the Catholic clergy, and in charge of the Sisters of the Holy Cross.

If the term "church" used in a bequest imports an organization for religious purposes (Baker *vs.* Fales, 16 Mass., 495) the term "Catholic Orphan Asylums," in a bequest to certain schools organized as private charities by the Catholics, certainly imports a gift for the use and benefit of that denomination, and bring these gifts within the scope of the Bill of Rights, the gifts not having been made thirty days prior to testator's death.

If for either of the above two reasons the bequests lapse, they fall in the residuary clause.

1 Perry on Trusts, sec. 160 (*a*).

IX.

Clause (*g*) of the Will.

The bequest to testator's trustees:

"(*g*.) To pay and see to the application of:

"A sufficient sum not to exceed three thousand dollars, the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University, otherwise in some medical college in the District to be known as the E. Carroll Morgan Scholarship," with proviso as to qualification of the applicant, is void:

(1.) Because no definite sum was donated and the amount was left to the personal discretion of trustees named who by reason of death and resignation can no longer exercise that discretion.

(2.) Because the discretion to select the particular medical college was reposed in the trustees named, and expired with the death of one and resignation of the other.

See authorities cited under preceding paragraphs.

A bequest to such corporations, having power to receive and hold funds upon permanent trusts for charitable or educational uses, as the trustees might select, and in such sums as they should determine, was held bad for uncertainty, and, because there were no certain beneficiaries who could complain, there was no enforcible trust.

Pritchard *vs.* Thompson, 95 N. Y., 76.

(3.) Because the gift was not really to any college, but really to testator's trustees to apply the income for the professional education in medicine of any person who might chance to stand the most excellent in a competitive examination. (See proviso to clause *h*.) Neither in the character of the education or the designation of the recipient to be benefited does it fall within the designation of a charity.

It is merely a bequest falling within the class of gifts designated benevolence and liberality.

"If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee, although the bequest is to a public charity."

Stratton *vs.* Physio-Med. Inst., 148 Mass., 505.

The beneficiaries are indefinite, uncertain, not chartered, and not limited to any charitable objects.

"The court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society."

2 Pomeroy Eq. Jur., sec. 1019, notes.

Corporation of Gloucester *vs.* Wood, 3 Hare, 131, 136, 148.

"A bequest to a Sunday school to be used in making Christmas presents is not a charity."

Goodell *vs.* Union Ass., 29 N. J. Eq., 32.

"The principle on which the decision in Norris *vs.* Thompson's Ex'or, 4 C. E. Gr., 308, s. c. on appeal, 5 C. E. Gr., 489, rests, is, that where a trust is in such general terms that the fund may be applied at the discretion of the trustees, not only to purposes strictly charitable according to the settled meaning of the term, but also to other indefinite purposes of benevolence or liberality it is void for the reason that the court cannot direct the application of any part to charitable uses against the terms of the trust giving an option to the trustees to apply it wholly to other purposes of a different kind."

Decamp *vs.* Dobbins, 29 N. J. Eq., 46.

Mr. Justice Gray, delivering the opinion of the Supreme Court of the United States in Jones *vs.* Habersham (107 U. S., 174), said:

"It is only when a gift might be applied to benevolent purposes which are not charitable in that sense, that the gift fails," citing:

Saltonstall *vs.* Sanders, 11 Allen (Mass.), 446.
Suter *vs.* Hilliard, 132 Mass., 412.
Decamp *vs.* Dobbins, 29 N. J. Eq., 36.
Adge *vs.* Smith, 44 Conn., 60.
In re Jarmon's Est., 8 Ch. D., 584.

Lord Brougham states the distinction thus:

"If the intention be charity, the court will execute it however vaguely the donor may have indicated his purpose, but mere purposes of a kind generally beneficial, as of those of benevolence or liberality without specifying the objects, who are to receive, and these objects not being the poor the court will never attempt to execute."

Att'y Gen'l *vs.* Haberdashers Co., 1 Myl. & K., 428.
2 Perry on Trusts, sec. 712, note.

"A trust to keep testator's house open for the entertainment of ministers and others of his faith, traveling in the

service of truth, being merely for hospitality, although the purpose may have been to aid in spreading the truth, is not charitable."

Kelly *vs.* Nichols, R. I. (1892) (17 & 18 R. I.), 19 L. R. Ann., 413.

Where a fund was left in hands of testator's executors to apply "to the personal relief of the poor, *or otherwise in the service of the truth*," the bequest was held void. On this point the court said:

"While this implies that some portion of the fund may be used for the personal relief of the poor, it by no means limits or directs the application to such use, and the phrase 'or otherwise in the service of truth' places a use for the poor at most only in the alternative with the other uses which the testator had already pointed out in his will."

Idem, 17 R. I., 321.

If this is a lapsed legacy, it being of money, it falls into the residuary clause (*i*) of the will.

"If the subject-matter of the bequest that fails is personal estate, the residuary legatee will take all that results, for a general residuary bequest is always held to carry every interest, whether undisposed of in the will, or undisposed of in any event."

1 Perry on Trusts, sec. 160 (*a*), citing:
Dawson *vs.* Clarke, 15 Ves., 417.
Brown *vs.* Higgs, 4 Ves., 708; 8 Ves., 570.
Shanley *vs.* Baker, 4 Ves., 732.
O'Key *vs.* Heath, 1 Ves., 141.
Cambridge *vs.* Rous, 8 Ves., 25.
Cooke *vs.* Stationers Co., 3 M. & K., 264.
Bland *vs.* Bland, 2 Z & W., 406.
Jones *vs.* Mitchell, 1 S. & S., 298.
Leake *vs.* Robinson, 2 Mer., 392, etc., etc.

X.

Clause (*h*) of the Will.

The bequest to testator's trustees—

"(*h*.) To pay and see to the application of:

"The sum of five thousand ($5,000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as said testator might thereafter verbally indicate to his trustees, or if he failed to so indicate, then as his trustees with the advice of proper persons might decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of his will (*g* and *h* above) shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown," is void for the following reasons:

"(1.) Because the gift and devise is uncertain as to its object and too indefinite, and depends upon proof of verbal directions given or to be given outside of the will.

"(2.) Because it cannot now be determined whether said testator indicated his wishes in the premises verbally to the said William J. Stephenson, the deceased trustee, or not; if he did so indicate, such indication then and there superseded the other provisions of the clause, and since such verbal instructions cannot be given effect the whole devise must lapse.

"(3.) Because the specific application of the gift is not therein determined, but left with trustees, one of whom is now dead, and with other persons who were to be selected and whose competency was to be passed on by said trustee now dead, and the power was one personal to the trustees named in the will and did not pass to the substituted trustees.

"(4.) Because there is no such corporation as Georgetown University in the District of Columbia, and if the institution

of learning, *i. e.*, "The Corporation of the Roman Catholic Clergymen," which operates a university there, is meant, it is a gift or devise for the support, use and benefit of a religious sect, order, denomination and public teacher of the gospel made within one calendar month prior to the death of the testator."

(1.) It is clear that the first provision creating a $5,000 "E. Carroll Morgan fund" or "scholarship" to be applied as said testator might thereafter verbally indicate is void. It does not appear that he did verbally so indicate.

"Where the income was to be applied according to a statement appended and there was no such statement, the court held it could not presume that the intent was charitable."
Aston *vs.* Wood, L. R. 6 Eq., 419.
2 Perry on Trusts, sec. 705, note.

The alternative use,

"or if he failed to so indicate, then as his trustees with the advice of proper persons might decide, to the maintenance, &c."

is likewise void for several reasons.

In the first place the discretion is vested in the trustees in the alternative to apply the income to a scholarship in Georgetown University, the only limitation and description of the beneficiaries being stated as follows:

"That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia and at the time or within a year, a student in a Catholic or a public school of the District of Columbia, and most excellent in a competitive examination conducted by the faculty of the University of Georgetown."

It is not even probable that such a successful competitor would be an object of charity. He might well be the son of a millionaire. The gift is not to a class, with discretion vested in the trustees to select the candidate needing such bounty. But the use must go to the successful competitor.

This is clearly no charity, but a benevolence or liberality within the meaning of the rule, and, under the authorities hereinbefore cited, void.

(3.) As the trustees were vested with discretion to use the fund for the above purpose as they, with the advice of proper persons, might decide

"or to the maintenance of a scientific department in the Georgetown University."

the failure through illegality of the one alternative voids the whole bequest.

This is the exact point settled by the authorities quoted under paragraph IX of this brief and approved by the Supreme Court of the United States in Jones *vs.* Habersham, the case quoted.

This alternative provision also voids the bequest for the following reasons:

It was not a bequest to either use definitely. The discretion to apply it to the one purpose or the other was a power and discretion vested in his trustees named personally, to be exercised in conjunction with unnamed persons to be personally selected by them.

Where under the will the trustees were to select the beneficiaries from the charitable institutions of two States the court said:

"If they refuse to execute it, or the power remains unexecuted it is not apparent how the court would make the selection. * * * Neither could the court select individuals to perform a duty devolving upon the trustees, who are selected no doubt by reason of personal confidence in their capacity for the trust imposed."

Pritchard *vs.* Thompson, 95 N. Y., 76.

"Where a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree the gift is void."

People *vs.* Powers, 147 N. Y., 104.

"The death of trustees who are given by will power to select the beneficiary of a charitable bequest from several uncertain classes will defeat the bequest if it is to be considered valid in the first instance."

Gambel *vs.* Trippe, 75 Md., 252.
Powles *vs.* Jordan, 62 Md., 503.
Cole *vs.* Wade, 16 Ves., Jr., 27.
Att'y Gen'l *vs.* Berryman, 1 Dickens, 168.
Alexander *vs.* Alexander, 2 Ves., Sr., 643.

In the Maryland case—

"The bequest was to trustees to pay over to some Presbyterian institution in Baltimore as they may determine for charitable and religious purposes."

Gambel *vs.* Trippe, 75 Md., 252.

"A clause in a will which in effect is a mere authority to a third person to direct how a specified sum shall be disposed of is inoperative and the sum named therein being a void trust falls into the residue of the estate."

Bristol *vs.* Bristol, 53 Conn., 242.

In Fontain *vs.* Ravenel, 17 How., 369, the testator by the residuary clause gave his executors power to select the beneficiaries of the residuum from a certain class of charitable objects. They died without making the selection. It was held that the bequest lapsed.

In that case Mr. Justice McLean, delivering the opinion of the court, said:

"The testator was unwilling to give this discretion to select the objects of his bounty except to his executors. He relied on their discrimination, their judgment, their integrity and fitness, to carry out so delicate and important a power. He made no provision for a failure in this respect, by his executors, or the survivor of them, nor for the contingency of their deaths before Mrs. Kohne's decease. They died before they had the power to appoint, and now what remains of this bequest, on which a court of chancery can act?"

Fontain *vs.* Ravenel, 17 How., 369.

Again he said:

"Had the contingency of the death of Mrs. Kohne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivors of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country."

Idem.

It was further held that the prerogative power of the king, *parens patrie*, to apply such bequests to similar charities, *cy pres*, does not exist in the chancery courts of this country.

Idem.

If the bequests of money in clause (*h*) fail, they fall into the residuum.

1 Perry on Trusts, sec. 160 (*a*).

XI.

Clause (*i*) of the Will.

"(*i.*) And lastly as to all the rest and residue of his aforesaid share of his father's estate his trustees, their heirs and assigns shall hold the same for the benefit of his aforesaid sisters Eleanora and Minnie upon the same limitations, conditions, remainders and powers and in the same manner as the trustees under his father's will then hold retain and possess the 'remainder' and bulk of the respective shares of his said two sisters."

This clause has been construed to be valid by the decree of this court in equity cause No. 18045, which is in evidence and by which decree all parties hereto are bound, having been parties to same.

Under the will of said James E. Morgan as construed by this honorable court in equity cause No. 18045, the decree being in evidence in this cause:

"The trustees under said will of James E. Morgan, hold, retain and possess the remainder and bulk of the share of said Eleanora Speer in trust to hold and invest, and the rents, issues, income and profits thereof to pay to said Eleanora Speer during her life, and on the death of said Eleanora Speer to pay and give in absolute estate by such conveyance or other instrument as may be necessary to her issue the whole of said share, principal and interest, or if said Eleanora Speer shall die without issue living at her death, then to pay and give as aforesaid such share to such person or uses as said Eleanora Speer so dying without issue living at her death shall by her last will and testament indicate or provide."

And under said will as construed by this honorable court in said cause No. 18045:

"The trustees under said will of James E. Morgan hold, retain and possess the remainder and bulk of the share of said Minnie Mosher in trust to hold and invest and the rents, issues, income and profits thereof to pay to said Minnie Mosher during her life, and on the death of said Minnie Mosher to pay and give in absolute estate by such conveyance or other instrument as may be necessary to her issue the whole of said share, principal and interest, or if said Minnie Mosher shall die without issue living at her death, then to pay and give as aforesaid such share to such person or uses as said Minnie Mosher so dying without issue living at her death shall by her last will and testament indicate or provide."

See decree in evidence.

As has already been seen, this clause is the residuary clause for all testator's share coming from his father's estate.

And if the bequests in clauses (*c*), (*d*), (*e*), (*f*), (*g*), and (*h*) have lapsed, they, being all gifts of personal property, fall into the residuum and go to the beneficiaries of the residuary clause.

1 Perry on Trusts, sec. 160*a*.

ASSIGNMENT OF ERRORS

On Appeal to the Supreme Court of the United States.

October Term, 1905.

No. 153.

Eleanora D. Speer, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend, and James Mosher, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and Anna M. Mosher, Appellants,

vs.

Michael J. Colbert, One of the Substituted Trustees under the Last Will and Testament of Ethelbert Carroll Morgan, Deceased, and John D. Whitney, James P. Fagan, Edward McTamany, James B. Becker, and Edward I. Devitt, Sued as Representing Themselves to be the President and Directors of Georgetown College, and Saint Vincent's Orphan Asylum and The Trustees of St. Joseph's Male Orphan Asylum, Appellees.

Appeal to the Supreme Court of the United States from decree of October, 12, 1904, passed by the Court of Appeals of the District of Columbia, in appeal cause number 1368 and cross-appeal causes number 1369 and 1370, in said Court of Appeals.

And now comes, Eleanora D. Speer, in her own behalf, and by Emory Speer her husband and next friend, and now come James Mosher one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, and as appellants on appeal to the Supreme Court of the United States, from the decree of the Court of Appeals of the District of Columbia passed and entered on the 12th day of October, 1904, in said appeal cause numbered 1368 and said cross-appeal causes numbered 1369 and 1370 in said Court of Appeals, and make this their assignment of errors, and say that in the record and proceedings in the above entitled matter, there is manifest error in this to wit:

I.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm, that part of the decree of the Supreme Court of the District of Columbia passed on May 21, 1903, which construed the last will and testament of Ethelbert Carroll Morgan deceased, and which held, declared and decreed that the devises and bequests to which the sub-clause of said will designated "*a*" in the bill of complaint, is applicable, are valid and effectual devises and bequests.

II.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions,

in so far as the same declared, held and decreed that the devises and bequests to which the sub-clause of said will designated "*b*" in the bill of complaint, is applicable, are valid and effectual devises and bequests; and said Court of Appeals erred in not decreeing that the said devises and bequests to which said sub-clause "*b*" is applicable are void, not only for indefiniteness and uncertainty, but also because within the prohibition of the Maryland bill of rights and Section 457 of the Revised Statutes of the District of Columbia; and said Court of Appeals erred in not decreeing that said devises and bequests to which said sub-clause "*b*" is applicable have lapsed, and evolve upon and pass to the heirs at law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

III.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm, those parts of the decree of the Supreme Court of the District of Columbia passed on May 21, 1903, which construed the last will and testament of Ethelbert Carroll Morgan, deceased, and which held, declared and decreed that the bequests to which the sub-clauses of said will respectively designated "*c*," "*f*" and "*g*," in the bill of complaint, are applicable, are void and invalid, and of no effect, and that the bequests attempted to be made by said sub-clauses, or to which said sub-clauses are applicable, have lapsed and become inoperative; and further

that all of said void and lapsed legacies, being bequests of money have fallen into the residuum of the estate of said testator, and pass to the beneficiaries under the terms of the residuary clause of said will designated as clause "*i*" in said bill of complaint, which residuary clause was held, declared and decreed to be valid and effectual.

IV.

That said decree of said Court of Appeals of October 12, 1904, with its opinion and directions, construing sub-clause "*b*" of Ethelbert Carroll Morgan's will, (*i. e.* the sub-clause designated "*b*" in the bill of complaint) is erroneous, so far as it determines that the devise and bequest to which said sub-clause "*b*" is applicable (viz: the devise and bequest "to Georgetown University in the District of Columbia, to be an endowment in equal shares of the literary and medical departments thereof"), is a devise and bequest intended for "The President and Directors of Georgetown College," the corporation chartered by the act of Congress of June 10, 1844;

(1.) Because it is contrary to the evidence, and to the express language of said will naming said devisee and legatee as "Georgetown University in the District of Columbia;"

(2.) Because it is conclusively shown by the evidence, that there was at the time of the making of said will an institution of learning in Georgetown in the District of Columbia, well known to the testator as "Georgetown University," and actually in operation as a university, under color of charter or char-

ters, (which charter or charters are separate and distinct from said charter of June 10, 1844, granted by Congress to certain persons, in the name of "The President and Directors of Georgetown College" * * * "for the instruction of youth in the liberal arts and sciences" only);

(3.) Because said finding and decree of said Court of Appeals erroneously makes said act of Congress of June 10, 1844, repeal the Acts of Assembly of the State of Maryland of November, 1792, ch. 55 and November, 1797, ch. 40, incorporating "The Corporation of the Roman Catholic Clergymen" and their successors, with corporate power to acquire, hold, establish, and conduct the college established at Georgetown, afterwards comonly known as Georgetown University, and also repeal the acts of Congress of March 1, 1815, and March 2, 1833, recognizing the corporate existence of said previously existing institution, and its president and directors, referred to therein as the "President and Directors of Georgetown College in the District of Columbia" and sanctioning in said institution the authority to teach the professions as well as the liberal arts, and to confer degrees as a university, and as such corporation to take and hold property and to sell and dispose of the same under their corporate seal. Notwithstanding that, at the time of the making of said will and of testator's death, said institution of learning at Georgetown in the District of Columbia was claiming corporate powers, franchises and existence under said acts passed prior to the aforesaid act of June 10, 1844, and was in operation as a university and specifically claiming university powers and

charter franchises under said acts of Congress o
March 1, 1815, and March 2, 1833, and the devis
was made by testator to said institution in the nam
of "Georgetown University in the District of Co
lumbia" under its said claim, as then made, of cor
porate existence, franchises and powers;

(4.) Because in finding and decreeing that sai
devise and bequest (*i. e.* sub-clause "*b*") was in
tended solely for said institution chartered by th
act of Congress of June 10, 1844, under the nam
of "The President and Directors of Georgetow
College," the said Court of Appeals erred in holdin
(R., 133) that there was not in operation in George
town, in the District of Columbia, an educational in
stitution (incorporated or un-incorporated) othe
than the institution operated solely under said char
ter of June 10, 1844, "of a name or title to which th
descriptive terms 'Georgetown University' coul
reasonably apply."

Whereas the evidence conclusively shows tha
at the time of Ethelbert Carroll Morgan's death an
of the making of said will and prior thereto, there
was at Georgetown in the District of Columbia, a
institution of learning commonly known as George
town University, claiming its establishment unde
said Maryland acts, and claiming its university
powers and franchises under said act of Congress o
March 1, 1815, and holding lands under said Mary
land acts, and under said act of Congress of March
2, 1833, granting lands to it as a corporation;

(5.) Because in finding and decreeing that said
devise and bequest (*i. e.* said sub-clause "*b*") was

intended solely for said institution chartered by said act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College," said Court of Appeals erroneously state: (Rec., 131.)

"It is not averred or pretended that there is any such institution as 'Georgetown University' in existence or operation in this District," and erroneously base said decree complained of upon this idea and misstatement of the record and of the contention and position of these appellants before that court, as appears by the pleadings, assignments of error, and contentions in said court of apeals (Rec., 147, 148);

(6.) Because in finding and decreeing that said devise and bequest (*i. e.* said sub-clause "*b*") was intended solely for the institution chartered by said act of Congress of June 10, 1844, under the name of "The President and Directors of Georgetown College" said Court of Appeals erroneously state:

"It is not attempted to be shown that there was or is in existence in this District any such incorporated institution of learning as 'Georgetown University' separate from and independent of Georgetown College" (the said court meaning by "Georgetown College" the corporation chartered by said act of Congress of June 10, 1844), and erroneously base said decree complained of upon this idea and misstatement of the record, and of the contention and position of these appellants before that court, as appears by the pleadings, evidence, assignments of error, and contentions in said Court of Appeals.

(7.) That said Court of Appeals, erred in said

On the other hand, the devise and bequest in clause (*b*) of testator's individual estate, real and personal, and being of the residuum of that estate if the bequest fails, goes to testator's heirs and next of kin, according as it is real estate or personal property.

1 Perry on Trusts, secs. 160, 160*a*.

XII.

The prayers of the bill not only called for a construction of the will, but prayed for an accounting from the trustees for income, &c. There will be no difficulty as to the last when the proper legal beneficiaries of the several clauses in question have been determined, as a direction for accounting has been made at the foot of the decree.

Respectfully submitted.

CONWAY ROBINSON,
Counsel for James Mosher, Substituted Trustee, and Anna M. Mosher.

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 13 1905
JAMES H. McKENNEY,
Clerk.

No. 153.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

ELEANORA D. SPEER, in her own behalf and by EMORY SPEER her husband and next friend, JAMES MOSHER, one of the substituted Trustees, under the last will and testament of ETHELBERT CARROLL MORGAN, deceased, and ANNA M. MOSHER,

Appellants.

vs.

MICHAEL J. COLBERT, one of the substituted Trustees, under the last will and testament of ETHELBERT CARROLL MORGAN, deceased, et al.,

Appellees.

BRIEF OF MARION ERWIN.

MARION ERWIN,
Solicitor for Eleanora D. Speer,
Complainant-Appellant.

BARNARD & MILLER, PRINTERS, CHICAGO

of June 10, 1844, authorized and empowered said corporation to teach religion and theology and the said Court of Appeals erred, in not giving effect and due weight to the evidence which shows conclusively that said institution was at the time of the making of said will and of the death of the said testator, actually engaged, by and through its so-called literary department in the exercise of its legally authorized functions as a public teacher of the gospels, of religion, and of theology, and for that reason the said Court of Appeals erred in not holding said bequest and devise to which said sub-clause "*b*" is applicable, void as within the prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia;

(6.) Because the said Court of Appeals in said opinion, by erroneously stating, ruling and finding that "for the limitations of the powers and objects of the college, we must look to the charter granted by Congress, (meaning the act of Congress of June 10, 1844) and not elsewhere," and in holding that the case at bar was controlled by the principles announced in the case of *Bradfield* v. *Roberts*, 175 U. S., 296, in effect ruled out or rendered nugatory all the evidence in the cause showing that as matter of fact said institution of learning intended as the devisee and legatee, by the testator, was at the time of the making of said will and ever since has been a public teacher of the gospel, and of denominational religion; and in effect ruled that if such teaching be *ultra vires* the charter of said institution, only the state could in a direct proceeding instituted for that purpose have such devise and bequest declared void;

And said Court of Appeals erred in basing said decree upon its said erroneous statements, rulings and findings;

(7.) Because the court erred in not decreeing that the devise and bequest to which sub-clause "*b*" of the will is applicable, has elapsed and that the same devolves upon the heirs at law and next of kin of said Ethelbert Carroll Morgan, who are entitled to receive the same.

VI.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the Supreme Court of the District of Columbia passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*c*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, one of which is stated in said sub-clause "*c*" as follows:

"(*c*) To pay and see to the application of the sum of ten thousand dollars, ($10,000) to Georgetown University in the District of Columbia to be used and held as an endowment for the prosecution of re-

search in the colonial history of Maryland and the territory embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan fund."

And the said Court of Appeals in its said opinion and decree (finding and decreeing that said subclause "*c*" is valid and effectual and that the said corporation chartered on June 10, 1844, is entitled to receive the same) erred:

(1.) Because said bequest was not intended to be used for the instruction of youth in the liberal arts and sciences;

(2.) Because it does not appear that any student connected with said college would ever derive the silghtest benefit from any result that might arise from the prosecution of the researches so vaguely referred to;

(3.) Because the prosecution of such research is foreign to the purpose for which said college was chartered;

(4.) Because said bequest is not for a charitable purpose, the public being given no right or interest therein, and said corporation chartered by act of Congress of June 10, 1844, as a private corporation, could not hold or execute a trust for a purpose not within the authority of its charter, even if germane thereto where the bequest is not a charity;

(5.) Because said bequest is not a charity, and there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or nonfeasance on the part of said college or of the trustees, and said bequest is therefore void;

(6.) Because said bequest is uncertain and indefinite as to how much of said bequest is to be "held" as an "endowment" or as a "fund" and how much of said bequest is to be "used" in the prosecution of research and obtaining and preserving archives and papers, the discretion for determining the same being vested in the trustees named in said will, one of whom is dead and the other resigned, and such discretion cannot be exercised by substituted trustees;

(7.) Because said bequest is too uncertain, vague and indefinite, as to the nature and extent of the research to be made into the colonial history of Maryland and the District of Columbia, and the object and purpose thereof, and as to the character and nature of the archives and papers to be obtained and preserved, for the exercise of discretion by the original trustees named in the will, and still more by substituted trustees;

(8.) Because said will was made less than thirty days prior to testator's death, and contained said gift, devise and bequest to Georgetown University, of goods and chattels, for the support, use and benefit of, and in ease of, a religious sect, order or denomination, or a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia, and said bequest is therefore void;

(9.) Because of the same errors as to said sub-clause "*c*" which have been hereinbefore assigned as to said sub-clause "*b*."

VII.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the Supreme Court of the District of Columbia passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*f*," in the bill of Complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, among which are those stated in sub-clauses designated "*d*," "*e*" and "*f*" in the bill of complaint, which are as follows:

"To pay and see to the application of——

(*d.*) A sum *not to succeed* five thousand (5,000) dollars to be applied and expended under the personal supervision of his trustes to the purchase and erection of a chime of bells and either a side altar or memorial window for some one Catholic church, said church to be in the District and to be designated by his mother by her last will or otherwise.

(*e.*) And if his mother fails so to do, he directs his trustees to donate the *same* to some Catholic church giving a preference if there be one built by the Jesuits.

(f.) And if the foregoing gift be void he directs *said sum not exceeding* $5,000 shall be equally divided between Saint Vincent's and St. Joseph's Catholic orphan asylums in the City of Washington."

And the said Court of Appeals in its said opinion and decree (finding and decreeing that said sub-clauses "*d*" and "*e*" are invalid and void, but that said sub-clause "*f*" is valid and effectual, and that the appellee corporations, the "Saint Vincent's Orphan Asylum," and the "Trustees of St. Joseph's Male Orphan Asylum" are entitled each to receive as legatees under said bequest one-half of the sum of ($5,000) erred in so finding, holding and decreeing as to said sub-clause "*f;*"

(1.) Because there was no definite sum donated, but the amount to be used and its expenditure was left to the personal supervision of his trustees named, one of whom is dead and the other resigned. And the $5,000 was only named as a *maximum limit*, but the amount to be used was (within that limit) a matter left not merely to the discretion of trustees no longer capable of exercising it, but subject to caprice or choice of his mother.

(2.) Because the words "*said sum not exceeding* $5,000" in said sub-clause "*f*" refers back to the *same uncertain sum* attempted to be contingently disposed of in sub-clauses "*d*" and "*e,*" in which clauses the amount was an *uncertain sum* dependent upon an *uncertain object* calling for greater or less expenditure according to the choice of the object and the caprice of his mother;

(3.) Because testator's persistence in the attempt to make said precedent bequests covered by sub-clauses "*d*" and "*e*," (although from the language used by him in said sub-clause "*f*" he appears to have been advised that said bequests in sub-clauses "*d*" and "*e*" might be void,) makes it the evident intent of testator, that a choice of an object should be made by his mother or by his trustees under said sub-clauses "*d*" and "*e*," and that a sum (within the aforesaid maximum limit) sufficient in their discretion for the object selected, should be set apart by his trustees for that purpose, and that a test should be made of the right to so apply it, and only after failure so to achieve that object, is the sum so intended to be set apart, bequeathed by said sub-clause "*f*."

(4.) Because in said sub-clause "*f*" no definite amount is named, and it was only to be such an amount as his designated trustees named, exercising the discretion reposed in them personally, might have expended for a chime of bells and side altar or memorial window of an undesignated church;

(5.) Because the trustees named having no longer the power to execute the personal discretion vested in them, one being dead and the other resigned, the trust is not capable of being executed;

(6.) Because said gift and bequest to said "Catholic orphan asylums," was void as being in contravention of the Maryland bill of rights and section 457 of the Revised Statutes of the District of Columbia.

VIII.

That said Court of Appeals erred in said decree of October 12, 1904, and in its opinion and directions, in so far as the same reverses and does not affirm that part of the decree of the Supreme Court of the District of Columbia, passed on May 21, 1903, which construed said will of Ethelbert Carroll Morgan, and which held, declared and decreed, that the bequest to which the sub-clause of said will designated "*g*," in the bill of complaint, is applicable, is void and invalid and of no effect, and that said bequest lapsed and fell into said residuary clause designated "*i*" in the bill of complaint:

The said Ethelbert Carroll Morgan, having by said will devised and bequeathed his share in his father's estate, to his trustees named in his will, to be held on certain uses and trusts, one of which is stated in said sub-clause "*g*" as follows:

"To pay and see to the application of—

(*g.*) A sufficient sum *not to exceed* three thousand dollars, the income to be applied to maintain a scholarship in the study of medicine perferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship. (With the proviso that the qualifications under said clause shall be) that the applicant be born in the District of Columbia, and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown."

finding and decree and in the opinion filed therewith, in holding and decreeing that one-half of the said devise and bequest to which said sub-clause "*b*" is applicable, as intended by said testator, for the endowment of any medical school conducted under authority of said charter granted June 10, 1844, by Congress to James Ryder and others, under the name of "The President and Directors of Georgetown College." The said charter not authorizing a medical school or the teaching of medicine, and there being at the time of making said will, and at the time of the death of the testator, and known to him, a medical school, or a medical department, in which he was a professor, in the institution of learning, in the District of Columbia, commonly called "Georgetown University," and which was not operated under said charter of June 10, 1844, but under a charter or charters separate and distinct therefrom.

(8.) Because said devise and bequest to which said sub-clause "*b*" is applicable, not being to any corporation by its name, but to a "university," operated, and claiming to be in operation, as shown by the evidence and known to the testator at the time of the making of the will under several different charters, creating separate corporations, the said devise and bequest is too indefinite and uncertain as to the devisee intended, to be given effect.

V.

That said decree of said Court of Appeals of October 12, 1904, with its opinion and directions construing said sub-clause "*b*" of said testator's will is

erroneous, so far as it determines that the devise and bequest to which said sub-clause "*b*" is applicable (viz: the devise and bequest to "Georgetown University in the District of Columbia, to be an endowment in equal shares of the literary and medical departments thereof") is a valid and effectual devise and bequest to "The President and Directors of Georgetown College," the corporation chartered by the act of Congress of June 10, 1844, and that said corporation is entitled to take, receive or hold the same;

(1) Because said finding and decree in effect holds that said corporation chartered June 10, 1844, "for instruction of youth in the liberal arts and sciences" and authorized to receive bequests and devises for that purpose *solely*, and not for "any other purpose or object" is competent to conduct a medical school and to receive and administer such fund for such purpose, whereas it is not competent so to do;

(2) Because said finding in said decree is erroneous, in that the devise and bequest was to "Georgetown University in the District of Columbia," an institution shown by the evidence to be operated under color of several different charters, but not itself a corporation by the name of "Georgetown University in the District of Columbia," or by the name of "Georgetown University," the said institution as a whole being, as shown by the evidence, under the management and control of the Society of Jesus, a religious order, and operated in part as a religious college, under charter, or color of charter, granted under the laws of Maryland to "The Corporation of

Roman Catholic Clergymen" incorporated under the provisions of the Acts of the Legislature of Maryland of 1792, chapter 55, and 1797, chapter 40, and recognized as such corporation, with university powers, by acts of Congress of March 1, 1815, and March 2, 1833, which refer to it as the College of Georgetown in the District of Columbia, and make grants to the President and Directors of Georgetown College in the District of Columbia, and operated in part under the decretal order of the Pope of March 30, 1833. Said devise and bequest having been made within less than thirty days before the death of the testator, and being a gift, devise, and bequest of lands, goods and chattels, for the support, use and benefit of a religious sect, order or denomination, and to a public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia;

(3.) Because said court erred in reaching the conclusion on the facts relative to said university not being a public teacher of religion, and that said devise and bequest was not for the benefit of a religious sect, order or denomination, by ruling and holding as matter of law that the denials in the answers of the defendants Whitney and others, sworn to by them, and without any opportunity given complainant to cross-examine them, was evidence in the case, and giving effect to such denials as evidence.

Whereas answer under oath was expressly waived in the bill, and the said denials were not evidence in the cause; and whereas the documentary evidence in the case, including the religious books actually

taught in the classes, as shown by the undisputed testimony and the catalogues issued by the college through a course of years, giving the curriculum for the different classes, showing that no degree in the classical department can be taken at said college unless the student takes the prescribed course in what is therein called "philosophy," being the course in the doctrinal teaching of the church, so denominated in the decretal order of 1833, made by the Pope in respect thereto, was sufficient to fully establish the facts so denied;

(4.) Because said Court of Appeals erred in finding that said university was not a public teacher of religion, and that said devise and bequest was not for the benefit of a religious sect, order or denomination, by erroneously stating, ruling and finding in said opinion as follows:

"The act of incorporation of the college (meaning the act of Congress of June 10, 1844) does not limit the exercise of the corporate powers conferred, to the promotion of any particular religious creed or denomination; but the college is open to all alike. For the limitations of the powers and objects of the college, *we must look to the charter granted by Congress and not elsewhere.* The objection urged would seem to be fully answered by the decision of the Supreme Court of the United States, in the case of *Bradfield* v. *Roberts*, 175 U. S., 296." And by so limiting the scope of its inquiry to said charter of June 10, 1844, said court thereupon erroneously stated, ruled and found in said opinion (Rec., 134), that:

"The bequests in question are not to any minister, public teacher or preacher of the gospel as such, or to any religious sect, order, or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order, or denomination. The fact that the college is or may be under the administrative control of a religious order, known as the Order of Jesus, does not bring the institution within the prohibition of the declaration of rights. The college is not a religious institution intended for the tuition and propagation of a particular doctrine and creed of religious belief, to the exclusion of all other creeds and beliefs, but is an institution of learning for the admission and education of students of all denominations of religious faith."

And in so stating, ruling and finding the said Court of Appeals erroneously followed the ruling of the trial court, that under the decision of the Supreme Court in the case of *Bradfield* v. *Roberts,* 175 U. S., 296, all questions in the case at bar, as to the sufficiency of the proof as to whether said institution was *in fact* a public teacher of the gospel, and whether said devise and bequest was for the benefit of the same as such teacher, and for the benefit of a religious sect, order and denomination, *must be laid aside.*

And said Court of Appeals erred in basing said decree upon its said erroneous statements, rulings and findings.

And whereas, necessarily it must always be a matter to be determined by the evidence, within the meaning and intent of the bill of rights:

Whether the devisee or legatee be in fact a public teacher of the gospel.

Whether the devise or legacy *was intended* by the testator, for the support, use or benefit of such devisee or legatee in the capacity of such teacher, or for individual or other use.

Whether the devise or legacy *was intended* for the benefit or use of a religious sect, or order or denomination.

Whether the use to which such devise or legacy is to be applied, would in fact be for the benefit of, or in ease of a religious sect, or order, or denomination;

(5.) Because if said Court of Appeals be correct in construing the term "sciences" in the language of the charter of June 19, 1844, conferring corporate power upon James Ryder, *et al.*, under the name of "The President and Directors of Georgetown College," "for the instruction of youth in the liberal arts and sciences" not to be a limitation of corporate power to the teaching of the liberal arts and liberal sciences, (excluding the professions and theology as held by the trial court) but was a grant of corporate power to said institution chartered by said act of June 10, 1844, to teach all things comprehended in the broadest use of the word "science," defined in said opinion (Rec., 137) to be:

"Acknowledged truths and laws, in any department of mind or matter, digested and arranged into a system; a profound or complete knowledge of all acknowledged truths relating to any subject-matter," and if said bequest and devise be intended for that institution, then in such case the said charter

District of Columbia. That Ethelbert Carroll Morgan was a legatee in said will, and under said decree of distribution his share in the personal estate of his father was paid over to John H. Magruder surviving executor as aforesaid.

(Paragraph 4 of the Bill.)

That said Ethelbert Carroll Morgan in his said will, after making certain specific bequests, appointed William J. Stephenson and John H. Magruder trustees for all the rest of his estate, to hold the same on certain uses and trusts in said will specified. That under the decree of this court in equity cause No. 16147 said James Mosher and Michael J. Colbert were substituted as trustees under said will in place of John H. Magruder who resigned and William J. Stephenson, deceased. A certified copy of the decree of substitution is attached to the stipulation filed in the record.

(Paragraph 5 of the Bill.)

That said Ethelbert Carroll Morgan died seized and possessed of both real and personal property in the District of Columbia, besides his share in his father's estate. That said real property of the estate of Ethelbert Carroll Morgan, other than his share in his father's estate passed into the possession of James Mosher and Michael J. Colbert, substituted trustees as aforesaid, and the said personal estate of Ethelbert Carroll Morgan left in trust as aforesaid, other than that derived from his share of his father's estate, passed into the possession of John H. Magruder surviving executor as aforesaid and by him was paid over to the said James Mosher

and Michael J. Colbert substituted trustees as aforesaid.

That the real and personal property derived from the individual estate of Ethelbert Carroll Morgan as aforesaid, so held on April 1, 1900, by the said James Mosher and Michael J. Colbert substituted trustees as aforesaid consisted of:

INDIVIDUAL ESTATE OF E. CARROLL MORGAN.

Real estate in Washington, D. C. (specified) assessed at	$ 5,800 00
Personal estate (specified)	17,804 10
	$23,604 10

That said property is still in the hands of said substituted trustees, besides the income accrued thereon.

(Paragraph 6 of the Bill.)

That James Mosher and Michael J. Colbert substituted trustees as aforesaid, have received the share of Ethelbert Carroll Morgan in the estate of James E. Morgan, deceased, under the decree of distribution in equity cause No. 18045 as aforesaid, and on April 1, 1900, held in their possession the share or proceeds thereof as follows:

SHARE OF E. CARROLL MORGAN FROM ESTATE OF JAMES E. MORGAN.

Real estate and proceeds of same in District of Columbia (specified)	$25,327 33
Personal estate (specified)	27,477 83
Proceeds of Maryland real estate	1786 76

That said property is still in the hands of said substituted trustees, besides the income accrued thereon.

The defendants claiming to be "The President and Directors of Georgetown College" admit in their answer (paragraph 5) that the will of Ethelbert Carroll Morgan is on file in office of the Register of Wills in the District of Columbia, and refer to it for proof of its contents. They admit in their answer (paragraph 1) that they represent themselves to be "The President and Directors of Georgetown College" and (paragraph 8 of answer) That "The President and Directors of Georgetown College" do claim the legacies mentioned in said will.

By stipulation of counsel (Record, p. 46, it was agreed:

> "That the copy of the last will and testament of the said Ethelbert Carroll Morgan attached to the bill is a true copy of the original will, duly admitted to probate in the District of Columbia. This stipulation is subject to correction of any clerical error, should it be discovered during the progress of the case that said copy in any way departs from the original will as probated."

By additional stipulation filed in the record (p. 79) it was agreed between the parties that the said will, a copy of which is attached to the bill, was to be taken as proved for all purposes.

II.

The Provisions of E. Carroll Morgan's Will.

An examination of the agreed copy of the will of E. Carroll Morgan attached as an exhibit to the bill, (Rec., p. 14), will show that there are two distinct estates devised and bequeathed to his trustees, which he dealt with and dealt with differently, viz.:

(1) His individual estate, and (2) His share in his father's estate. The property represented by these estates have been kept separate in the hands of the substituted trustees and the exact amount of the real and personal property of each, in the hands of the substituted trustees, is admitted by the defendants as above stated.

For convenience of reference certain clauses of the will have been designated by the pleader by the letters (a), (b), (c), (d), etc., and the same set forth in paragraph 7 of the bill. (Rec., p. 4.) It is on the legal effect of the several provisions of the will so designated in connection with the evidence offered applicable thereto that the case turns, and it will therefore be necessary to take up and consider these paragraphs of the will separately.

III.

Carroll Morgan's Individual Estate.

The property owned by the said Ethelbert Carroll Morgan at his death (other than his share in his father's estate) which said Ethelbert Carroll Morgan's devised and bequeathed to his said trustees, he directed in his will should be held by his trustees on the uses and trusts as follows:

> "(*a*) To apply the income and profits to the use and benefit of his two sisters, your oratrix Eleanora Speer and Minnie Mosher (otherwise known as Anna M. Mosher), in equal parts, during their lives and at their death to deliver and convey each sister's share to her issue, and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue, if any survive her.
>
> "(*b*) And if his said two sisters shal both die leaving no issue living at their deaths, he directs his said trustees to deliver and convey all the said rest, residue and remainder of his estate (excepting his share aforesaid under his father's will) to Georgetown University in the District of Columbia to be an endowment in equal shares of the Literary and Medical Department thereof."

The devise and bequest (clause *b*), of the remainder interest in his individual estate to "Georgetown University in the District of Columbia to be an endowment in equal shares of the Literary and Medical Department thereof" is attacked, and it is contended by the bill that it should be decreed to be

a lapsed legacy going to the next of kin and heirs at law of the testator. It is admitted by the stipulation filed in the record (Rec., p. 79) that appellants Eleanora D. Speer and Anna M. Mosher are each of them next of kin and heirs at law of testator.

The grounds of this contention are:

That said devise and bequest to "Georgetown University," an institution operated mainly for the inculcation of denominational religion, and conducted by a religious society of teachers and preachers is in fact a gift or devise of lands:

(a) To ministers and preachers of the Gospel as such.

(b) To teachers of the Gospel as such teachers.

(c To a religious sect.

(d) To a religious order.

(e) To a religious denomination.

(f) Or for the support, use, benefit of, or in trust for all or the same of the above objects.

(g) It is also a devise of goods and chattels to the same.

(h) That therefore the will having been made less than one calendar month prior to the death of the testator, the devise and legacy is void under the provisions of the 34th Section of the Maryland Declaration of Rights, as amended by Act of Congress of July 25, 1866, Sec. 457 R. S. Dist. of Columbia.

By 34 Section of the Maryland Bill of Rights:

> "Every gift, sale or devise of lands to any minister, public teacher or preacher of the Gospel as such, or to any religious sect, order or

denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the Gospel as such, or any religious sect, order or denomination every gift or sale of goods or chattels to go in succession or take place after the death of the seller or donor to or for such support, use or benefit, and also every devise or goods or chattels to or for support, use or benefit of any minister, public teacher, or preacher of the Gospel as such or any religious sect, order or denomination, without leave of the Legislature.'

Are declared to be void and of no effect unless such gifts and devises described in said provision of the law just quoted

"Shall be made at least one calendar month before the death of the donor or testator."

(See Section 457, Revised Statutes, Dist. of Col.)

IV.

History of Georgetown University.

Under notice to produce, the defendants, claiming to be the President and Directors of Georgetown College, produced (Rec., p. 28) the catalogues of the institution conducted by them for the years 1890, 1891, 1899, 1900, and 1901, and said catalogues are in evidence marked Exhibits B, C, D, E, and F (Rec., pp. 28, 46). These catalogues, as well as the volumes of religious text books therein referred to, are by stipulation of counsel and the order of the Court of Appeals (Rec., 158) sent up to the Supreme Court of the United States as a part of the record on appeal.

Father Daugherty testified that they correctly set forth the *history*, the *teachings*, and the *practice* of the institution and its relationship to the Society of Jesus and the Catholic Church (Rec., pp. 31, 32).

The *history*, taken from said *Exhibit B* (Catalogue 1889-'90, pp. 3 and 14, is as follows:

"Georgetown University."

"Founded 1789."
"Chartered as a University,"
"By act of Congress, March 1st, 1815."

"Empowered by the Holy See"
"To Grant Degrees in Philosophy and Theology.
March 30, 1833."

"College of Medicine, Founded 1851."

"College of Law, Founded 1870."

"This college was the first Catholic institution

And the said Court of Appeals in its said opinion and decree, (finding and declaring that said sub-clause "*g*" is valid and effectual, and that the said corporation chartered on June 10, 1844, is entitled to receive the same) erred;

(1.) Because no definite sum was donated, and the amount to be used and its expenditure was left to the personal supervision of his trustees named, one of whom is dead and the other resigned. And the $3,000, was only named as a maximum limit, but the amount to be put out to earn the sufficient income, was (within that limit) a matter left not merely to the discretion of trustees no longer capable of exercising it, but subject to the uncertain ability of said trustees to make any certain sum upon which they might fix, earn continuously any certain income, so that the amount of principal to be withdrawn from testator's estate would be a varying quantity, dependent upon the personal discretion of the said trustees, the personal ability of the said trustees, the higher or lower rate of income obtainable, and the varying cost of maintaining from year to year, such scholarship in the institution selected, or according to which institution is selected;

(2.) Because said Court of Appeals, in construing said sub-clause "*g*" state and find in *its* said opinion:

"If the object in view should require the full amount of $3,000 to be expended, that amount will be applied; but if the object can be accomplished for less only so much as may be required will be applied:"

And erroneously hold and find that this discretion vested in said originally named trustees, is a discretion which passed to and can be exercised by substituted trustees;

(3.) Because under said sub-clause "*g*" the discretion to select the particular medical college, in which the scholarship is to be maintained, was reposed in the trustees named in the will, and expired with the death of one and the resignation of the other, and cannot be exercised by substituted trustees;

(4). Because said Court of Appeals, in construing said sub-clause "*g*," erroneously state and find in *its* opinion:

"In the first place, the testator himself has made his own selection by expressing his preference for Georgetown College, (meaning the corporation chartered June 10, 1844)" and erroneously hold and find that such expressed preference took away the discretion vested personally in his named trustees, by the testator in said sub-clause of said will to select some other medical college in the District of Columbia, as the college in which said scholarship might be maintained, and by this construction erroneously render certain, an element in the bequest which the testator left uncertain, and confided to the personal discretion of his named trustees, which discretion cannot be exercised by substituted trustees;

(5.) Because said Court of Appeals in construing said sub-clause "*g*" erroneously state and find in *its* said opinion, that it would be competent for said substituted trustees to apply said bequest to the

maintenance of a scholarship in any medical school operated by said corporation chartered by act of Congress of June 10, 1844. The said charter not authorizing said corporation to operate any medical school, and no provision having been made in said will for holding said bequest in abeyance until such charter could be obtained;

(6.) Because the bequest in said sub-clause "*g*" was not to any college, but really to testator's trustees, to apply the income for the professional education of any person who might chance to stand the most excellent in a competitive examination. Neither in the character of the education or the designation of the recipent to be benefited does it fall within the definition of a charity. It is merely a benevolence or liberality.

And not being a charity, there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or nonfeasance on the part of the college or of the trustes, and said bequest is therefore void;

(7.) Because the bequest in said sub-clause "*g*," not being a charity, limited by the will to a definite certain class, the statement and holding of the court in its said opinion, that the discretion vested by the will in the originally named trustees passed to and could be exercised by substituted trustees, as in the case of charities, where the class is definitely and certainly fixed and the discretion of the trustees is limited only to the selection of the particular individuals who are to be benefited, was erroneous; and one of said original trustees being dead and the other resigned, said bequest lapsed;

(8.) Because said will was made less than thirty days prior to the testator's death, and contained said gift, devise and bequest to, or in ease of, Georgetown University, of goods and chattels, for the support, use and benefit of, or in ease of, a religious sect, order or denomination, or public teacher of the gospel, as such teacher, within the meaning and prohibition of the Maryland bill of rights, and section 457 of the Revised Statutes of the District of Columbia, and said bequest is therefore void;

(9.) Because of the same errors as to said sub-clause "*g*" which have been hereinbefore assigned as to said sub-clause "*b.*"

MARION ERWIN and
J. R. LAMAR,
Solicitors for Appellant Eleanora D. Speer, in Her Own Behalf and by Emory Speer, Her Husband and Next Friend.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1905.

No. 153.

ELEANORA D. SPEER, in her own behalf and by EMORY SPEER, her husband and next friend, JAMES MOSHER, one of the substituted Trustees, under the last will and testament of ETHELBERT CARROLL MORGAN, deceased, and ANNA M. MOSHER,

Appellants,

vs.

MICHAEL J. COLBERT, one of the substituted Trustees, under the last will and testament of ETHELBERT CARROLL MORGAN, deceased, et al.,

Appellees.

Brief of Marion Erwin, for Appellant Eleanora D. Speer.

STATEMENT OF THE CASE.

I.

This is a suit brought by Eleanora D. Speer in the Supreme Court of the District of Columbia primarily for construction of the last will and statement of Ethelbert Carroll Morgan, late of the District of Columbia.

The allegations of the first six paragraphs of the bill are admitted in the respective answers of Michael J. Colbert and James Mosher the substi-

tuted Trustees under the will. A stipulation filed in the record (p. 79) admits them as to the other defendants.

From these admitted allegations it appears that:

(Paragraph 2 of Bill.)

Ethelbert Carroll Morgan, late of the District of Columbia, died testate on the fifth day of May, 1891, and his last will and testament which was made and dated thirteen days prior to his death was duly admitted to probate and record and letters testamentary were duly granted to William J. Stephenson and John H. Magruder, the executors thereof, who duly qualified as such executors, and thereafter said Stephenson died leaving said Magruder surviving executor of said last will and testament, as apears by the records and proceedings in the cause No. 4423 in the Supreme Court of the District of Columbia holding a Special Term for Orphan's Court business.

(Paragraph 3 of Bill.)

That the said Ethelbert Carroll Morgan was the son of James E. Morgan, late of the District of Columbia, who died on the 2nd day of June, 1889, testate, and whose last will and testament was admitted to probate and record, and which will was duly construed by this court in equity cause No. 18045, and decrees for the distribution of the estate of James E. Morgan entered therein. That the said James E. Morgan died seized and possessed of both personal property and real estate, some of said real estate was situate in the State of Maryland, but the greater portion thereof was in the

jority of them present at such election or appointment; and it shall and may be lawful for the *ministers aforesaid,* qualified as aforesaid, to meet as often as may be necessary for their general interests and concerns, or to fill up vacancies occasioned by death, resignation or other disqualification of any persons constituting the corporation or body politic aforesaid; which said corporation or body politic, and their successors, shall be capable of suing and being sued, impleading and being impleaded, in any court of law and equity within this state, by their corporate name, in as full and effectual manner as any other person or persons, bodies politic or corporate, may sue or be sued, implead or be impleaded."

Md. Act of November, 1792, Ch. 55.

Note a to Sec. 3 thereof is as follows:

"It appears by the records of the general court office, that the persons chosen declared and certified to the clerk of said court, *that they assumed the style, name and title of* THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN."

Id., 2 Kilty's Laws of Maryland.

MARYLAND ACT, 1797.

Thereafter the legislature of Maryland, in November, 1797, passed the statute, chapter 40, which, in Sec. 1, recites that William Deakins, Jr., and John Threlkeld, on January 23, 1789, by a certain deed conveyed unto John Carroll, John Ashton and Robert Molyneux certain lands in said deed men-

tioned, lying and being in Montgomery county, and that at the time of said conveyance it was understood between the parties thereto *that the said lands should furnish a site for the purpose of erecting a college or seminary of learning under the government and control of the Roman Catholic clergy of this state,* and that, in pursuance of such intention, the *said clergy* have from *their* funds *erected spacious buildings* upon said ground and *organized a seminary of learning* highly beneficial to many of the citizens of this state, and that, to render the situation of the college more convenient and healthy to the *students,* the said John Threlkeld, by a certain deed dated June 15, 1796, made over unto said John Carroll, John Ashton and Robert Molyneux, a certain other piece of ground adjoining that above mentioned, and that the said John Carroll, John Ashton and Robert Molyneux, *in order to give perpetuity to said institution,* have prayed this General Assembly that they may be *enabled* to convey said lands to THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN AND THEIR SUCCESSORS AS A BODY POLITIC, and that the prayer of said petition appears reasonable, and then enacts as follows:

"§ 2. That the said John Carroll, John Ashton and Robert Molyneux, or the survivors of them, be authorized and empowered to execute a deed of gift, in the usual form, to the SAID CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN, AND THEIR SUCCESSORS, appointed under the act (November, 1792, Ch. 55), entitled An act for securing certain estates and property for the support and uses of ministers of the Roman Catholic religion, and that upon the execution of said deed the said *Corporation of the Roman Catholic Clergymen and their succes-*

sors shall be seized and possessed of said ground, in as full and ample maner and of the same estate, title and interest, in law and equity, as the said John Carroll, John Ashton and Robert Molyneux now hold the same; and the said property and the rents, issues and profits thereof, shall, from thenceforth, *be under the sole control and management of the said body politic, and their successors,* so as aforesaid appointed.

"§ 3. That the Corporation of the Roman Catholic Clergymen be authorized, in behalf of the *College of Georgetown,* to receive donations from persons charitably disposed, sufficient for the maintenance and *education of 30 scholars,* provided the annual amount or product of such donations do not exceed, in any one year, the sum of four thousand dollars.

"§ 4. That all donations so made *shall be applied faithfully to the purposes for which* ALONE *they are allowed to be received,* and NOT TO ANY OTHER USES OF THE CORPORATION OF THE ROMAN CATHOLIC CLERGYMEN."

Md. Act of November, 1797, Ch. 40.

MARYLAND ACT, 1805.

The Maryland Act of 1805, Chapter 118 (see Maryland Laws for session beginning November 4, 1805), passed January 28, 1806, entitled "An act for the benefit of the Corporation of the Roman Catholic Clergymen, and for other purposes," first recites said Maryland act of November, 1792, and then (among other things) recites as follows:

"And whereas the aforesaid ministers of the Roman Catholic religion have, agreeably to the authority delegated by the said recited act, convened and assumed to themselves the style, name and title of *The Congregation of the Roman Catholic Clergymen,* and certified the same, under their hands and seals, to the clerk of the general court for the Western Shore, and the same hath been recorded among the records of the laws of the state:

"And whereas the Reverend James Walton, Robert Molyneaux and John Ashton, by several instruments in writing, sealed with their seals, each bearing date on the 3d day of October, 1793, and recorded among the records of the late general court for the Western Shore in Liber J. G. No. 3, folios 285, 286, 287, 288 and 289, by which said several instruments of writing it was, agreeably to the provisions of the said recited act declared, that all and every the property in the said instruments of writing specified, had been and was held, by the respective persons executing the same, under a confidential or implied trust, *for the use, benefit and maintenance of the ministers of the Roman Catholic Church, now exercising their ministerial functions within the United States of America, agreeably to the rules and discipline of their Church,* and who were formerly members of the religious society heretofore known by the name of *The Society of Jesus.*"

Section 2 of this act enacts:

"That the Corporation of the Roman Catholic Clergymen is hereby confirmed under and by that name, and under the name and style of The Corporation of the Roman Catholic Clergymen shall have all the estates, rights and authorities meant to be vested in or transferred to, the corporation intended and authorized to be established under and by virtue of the above recited act, entitled *An act for securing certain*

estates and property for the support and use of ministers of the Roman Catholic religion passed at November session, 1792."

Section 3 of this act enacts as follows:

"The Corporation of the Roman Catholic Clergymen shall be seized and possessed in al and every the property specified in the severa above recited instruments, etc., in as full and ample a manner, and of the same estate, titl and interest, in law and equity, as the said sev eral persons executing the aforesaid several in struments of writing respectively then held and possessed the same."

Maryland Act of 1808.

The Maryland Act of 1808, Chapter 37 (see Mary land Laws for session beginning November 7, 1808) passed December 20, 1808, entitled "An act for th benefit of the Corporation of the Roman Catholi Clergymen," recites that said corporation are pos sessed of two tracts in Maryland, between whic a vacancy was discovered and taken up, which va cancy was afterward purchased by Germain Ba naby Betanzey, who, by petition to the General As sembly stating the facts, prays authority to tran fer his title to the same to the Congregation of th Roman Catholic Clergymen. Section 2 of this ac authorizes him so to do.

ACT OF CONGRESS OF 1815.

The next legislation on the subject is found in the act of Congress of March 1, 1815 (6 Stat. L., p. 152), entitled "An act concerning the College of Georgetown, in the District of Columbia," which enacts as follows:

> "That it shall and may be lawful for such persons as now are, or from time to time may be, the President and Directors of the College of Georgetown, within the District of Columbia, *to admit any of the* STUDENTS BELONGING TO SAID COLLEGE, or other persons *meriting* academical honors, *to any degree in the faculties, arts, sciences,* AND LIBERAL PROFESSIONS, to which persons *are usually admitted* IN OTHER COLLEGES OR UNIVERSITIES *of the United States;* and to issue, in an appropriate form, the diplomas or certificates, which may be requisite to testify *the admission to such degrees.*"
>
> Act of March 1, 1815, Ch. 70; 6 Stat. L., p. 152.

LIBERAL PROFESSIONS.

"Nothing is more certain than the essential identity among all ancient nations of the *professions*—RELIGION, *law*, and *medicine*, which the progress of civilization has separated into three."

Standard Dict.—"Profession"—p. 1422.

"Formerly *theology, law*, and *medicine* were specifically known as the *professions.*"

The Century Dictionary—"Profession"—p. 4755.

Recognized as Corporation 1833.

On March 2, 1833, Congress, by an act entitle
"An act granting certain lots to the President an
Directors of the Georgetown College, in the Distric
of Columbia" (6 Stat. L., p. 538), granted "to *th*
President and Directors of Georgetown College, i
the District of Columbia," lots in the city of Wash
ington, to the amount, in value, of $25,000, whic
should be selected and valued by the commissione
of public buildings, when requested by the sai
President and Directors; which, "when so selecte
and valued," should "be vested in the *said corp*
ration, in fee-simple, to be by them held and dispose
of in the following manner; that is to say, the *sai*
corporation, by proper and lawful act or acts, *und*
their corporate seal, shall sell and dispose of th
said lots," etc., for the best price or prices they ca
obtain, and vest the proceeds as therein directed.

Section 3 enacted

> "that the proceeds of the sales aforesaid, so
> be vested, shall not be otherwise used by th
> *said President and Directors* than as a capita
> to be by them forever thereafter kept vested
> aforesaid; and the dividends, or interest, ther
> upon accruing, shall, by them, be used and a
> plied in the aid of the revenues of the said co
> lege to the establishment and endowment
> *such* PROFESSORSHIPS THEREIN *as are now,*
> *hereafter shall be, established* by *said Preside*
> *and Directors;* and to and for *no other purpo*
> *whatever.*"

Act of March 2, 1833, ch. 86; 6 Stat. L.,
538.

Papal Decree, 1833.

No further step was made in the history of this institution until the 30th of March, 1833, when Pope Gregory XVI issued the following decree, viz.:

"*Decretal of the Sacred Congregation of the Propagation of the Faith.*

"Inasmuch as the Reverend Father John Roottaan, general in chief of the *Society of Jesus*, by his suppliant petition, has explained to our Most Holy Master, by Divine Providence Pope Gregory XVI, that the *college of the said society*, situate in *Georgetown* in North America, by a law passed at a Congress of the Confederated States in the year 1815, had been *erected into a* UNIVERSITY, *in which young men* ARE INSTRUCTED IN PHILOSOPHY AND THEOLOGY, though nevertheless that degree cannot be conferred because power to confer it has not hitherto been given by the Holy See. Moreover, it being made to appear that if such *faculty* should be granted to *Georgetown College* (similar to which formerly was granted by the briefs of Julius III in the year 1552, and of Pius IV in the year 1561), in which it appeared, as was well known that in all colleges of that society wherein courses of *philosophy and theology* were adopted, *great benefit accrued to religion;* and especially when it should come to be known that the *Georgetown College* would be the only *university* in America with a *learned doctorate*, young *ecclesiastics* would flock to it, so that the courses of *theology*, which in their dioceses are slightly observed would then be properly performed. These things being stated by the Reverend Father in God, Castruccium Castracano, secretary of the Sacred Congregation of the Propagation of the Faith, to our

of *higher learning* founded in the United States, having been established in the year 1789, through the efforts of Rev. John Carroll, afterwards the first bishop of Baltimore. Classes, however, were not opened until 1791. Upon the reorganization of the Society of Jesus in Maryland, the Georgetown Academy, as it was then called, was transferred to the fathers of that society, under whose control and direction the *University* still remains.

"The college *was chartered as a* UNIVERSITY, by act of Congress March 1, 1815.

"In the year 1833 by an especial decree, the Holy See empowered *Georgetown University* to grant degrees in *philosophy* and *theology*.

"In 1845, an *astronomical observatory* was erected and fully equipped.

"The *College of Medicine* was opened in 1851 and the *College of Law* in 1870" (Exhibit B, pp. 3 & 14).

In this catalogue 1889-1890 (*Exhibit B*) under the head of "*School of Medicine*" (Catalogue, p. 12) the name of *Ethelbert Carroll Morgan* appears as *professor of laryngology*.

This was the last catalogue issued prior to his death, as his death is noted in the next succeeding catalogue.

It cannot be doubted, therefore, that he was cognizant of the fact that the institution claimed to exist as an "*incorporated university*" and to exercise *franchise university powers* under said act of Congress of 1815, as stated in its catalogue; and was not then an institution confined in its scope to the *limited purposes* given to the President and Directors of Georgetown College by the charter of 1844.

Exhibit C (Catalogue of 1890-'91, p. 16) states:

"Its (the institution's) foundation has hitherto been referred to the year 1789; but recent researches by the Rev. John Gilmary Shea, in connection with his history of the college, have established the fact that the earliest building was begun in the year 1788; students, however were not received before 1791. Upon the reorganization of the *Society of Jesus* in Maryland in 1805, the Georgetown Academy, as it was then called, was transferred to the *fathers of that society,* under whose control and direction the *university* still remains" (*Exhibit C,* p. 16).

The history taken from *Exhibit D* (Catalogue 1898-'99, p. 10) and from *Exhibit E* (Catalogue 1899-1900, p. 18), and from *Exhibit F* (Catalogue 1900-1901, p. 17), is set forth as follows:

"The foundation of Georgetown College was projected as early as the year 1785, when the Rev. John Carroll, afterwards the first archbishop of Baltimore, formed the plan and proposed it to his associates. On November 13, 1786, *the Corporation of Roman Catholic Clergymen,* in the chapter held at Whitemarsh, Md., adopted a series of "*Resolves concerning the institution of a school,*" in which *it ordered that a* SCHOOL *should be erected at Georgetown, Md.,* and directed the sale of a piece *of land belonging to the* CORPORATION, *in order that the proceeds might be applied to the erection of the first building.* Rev. Messrs. John Carroll, James Pelling, Robt. Molyneux, John Ashton and Leonard Neale were appointed directors.

"Shortly afterwards, an appeal was issued entitled '*Proposals to establish an academy at Georgetown, Potowmack river, Maryland.*' In this circular it was stated that 'Agreeably to the liberal principles of our constitution, the *seminary* will be open *to students of every religious profession.*'

"In 1788 the erection of the first building was

undertaken; yet 1789 is commonly considered the year of the foundation of the college, as the deed of the original piece of ground was dated January 23 in that year.

"Students were not received before 1791. Upon the reorganization of the *Society of Jesus* in Maryland in 1805, the Georgetown College, as it had already begun to be called, was transferred to the *fathers of that society,* under whose control and direction the *university* still remains."

Exhibit D (Catalogue 1898-'99, p. 17 quotes the act of Congress of March 1, 1815, and then states:

"Two years later the power of granting degrees, thus acquired, was first exercised" (*Exhibit D*, p. 17).

The brief or bull of Clement XIV in 1773 was issued to suppress the Society of Jesuits in every State of Christendom; but, as explained by Father Daugherty (Rec., p. 38), "there were certain formalities to be complied with in order that that brief should be executed," and "there is a question in the society whether the society was actually ever suppressed altogether" (Rec., p. 38). "The question was, whether we were ever really suppressed, that is entirely suppressed, because the formulas were not entirely carrid out" (Rec., p. 38). Jesuit priests had accompanied the first expedition sent out by Lord Baltimore to Maryland, and they and their successors had been performing the duties of their faith until the bull of Clement XIV, better known as Gangamelli. At that date Father Carroll was studying his profession in Europe, but was obliged to return to

Maryland. The exercise of the functions of all the members of the order was suspended until the issue of the Bull of Restoration by Pope Pius VII in 1814.

Maryland Act of 1792.

The clergy of that church were in such an unprotected condition during this period of suspension that the legislature of Maryland, in November, 1792, passed the statute, chapter 55, which recited in (§ 1):

> "Whereas it has been represented to the General Assembly that certain property, real, personal and mixed, or the rents and profits thereof, have been theretofore applied to the use, support and maintenance of *ministers of the Roman Catholic religion*, although the said property hath been held and possessed by certain individuals as the legal proprietors thereof, but under a confidential or implied trust, that the said property and the rents and profits thereof should be faithfully applied to the use, support or maintenance of *ministers of the Roman Catholic religion;* and whereas by the declaration of rights, all gifts or devises for the support, use, or benefit of any minister or preacher of the gospel, as such, or of any religious sect, order or denomination, without the leave of the legislature, are declared to be void; and whereas it is highly reasonable and just to grant unto *ministers of the Roman Catholic religion*, who are citizens of this state, that legislative aid, without which *they* will be destitute of that protection and security to *their* property to which *they* are entitled equally with every other sect or denomination of Christians;" and then enacted (notwithstanding said declaration of rights) as follows:
>
> "§ 2. That every legal proprietor or possessor of any property, real, personal or mixed,

held and possessed *on or before the 14th day of August, 1776,* under a confidential trust that the same, or the rents or profits thereof, should be applied to the use, support or maintenance, of *ministers of the Roman Catholic religion,* and every legal proprietor or possessor of any property, real, personal or mixed, acquired since the 14th day of August, 1776, by exchange for property held under a confidential trust as aforesaid, *before the said 14th day of August, 1776,* may have full power and authority, at any time hereafter, to execute an instrument of writing, declaring the purposes for which the said property hath been or is held in confidential trust, which said declaration, so to be made, shall be signed by the party making the same, in presence of two witnesses, and acknowledged in the same manner as deeds are directed by law to be acknowledged; and on the said declaration shall be endorsed the affidavit of the party, that the property comprehended in such declaration was really and *bona fide* held for pious purposes, or acquired as aforesaid, in manner and for the purposes aforesaid; and the same affidavit shall be recorded, with the same declaration, within six months after execution thereof."

"§ 3. That it shall and may be lawful for the *ministers of the Roman Catholic religion* within this state, citizens thereof, *exercising their ministerial functions agreeably to the rules and discipline of their church,* and in whose favor the said declarations shall have been made, to convene at a place to be by them agreed on, within twelve months from the passing of this act, and then and there *adopt such regulations for the management of their estates and temporalities as shall seem fit and advisable to a majority of the ministers so convened;* and the *said ministers,* or a majority of them, so met, shall then and there *choose,* FROM THEIR OWN BODY, *certain persons,* not less than three nor

more than five, WHO SHALL ASSUME THE STYLE, NAME AND TITLE BY WHICH THEY ARE TO BE DESIGNATED AND KNOWN, and *shall certify the same,* under their hands and seals, within three months thereafter, to the clerk of the general court of the western shore (see note *a*), who is hereby authorized and required to record the same in the records of the laws of this state, at the expense of the said *corporation,* and THEREUPON THE SAID PERSONS, AND THEIR SUCCESSORS, SHALL BE A BODY POLITIC OR CORPORATE, BY THE NAME AND DESCRIPTION SO ASSUMED BY THEM, FOR CARRYING INTO EXECUTION MORE EFFECTUALLY THE REGULATIONS AFORESAID, AND THE PROVISIONS OF THIS ACT; which said body corporate shall immediately be seized and possessed, in as full and ample manner, and of the same estate, title and interest, in law and equity, of all such property then declared in manner aforesaid to be held by any person or persons, upon the trusts and to the uses hereinbefore mentioned, or which thereafter shall be so declared to be held by any person or persons to the uses and upon the said trusts *before the 14th day of August, 1776,* or acquired since that period *by exchange for property so held,* as the person or persons making such declaration *now* hold and possess the same; and the *said property,* with the rents, issues and profits thereof, shall from thenceforth be under the *sole control and management* of the *said corporation or body politic,* and their successors, etc."

"§ 4. That all vacancies occasioned by death, resignation, or other disqualification, *of any person constituting the said corporation or body politic,* shall be filled and supplied, from time to time, by other person or persons elected or appointed by the *ministers of the Roman Catholic religion* within this state, citizens thereof, *and acting agreeably to the rules and directions to be established at their first meeting* to be held pursuant to this act, or by a ma-

Mr. Erwin: To the company?

Mr. Colbert: To the corporation, and afterwards, within probably three or four years, there was a re-conveyance of the property to Georgetown College.

Father Dougherty: We were too poor to pay that amount. I think it was $20,000.

Mr. Colbert: Where is that property, I forgot the number on H street?

Father Dougherty: No. 920 H street, northwest. You can get the title very readily by referring to the record of the conveyance."

It therefore appears that there was an organization under the charter, that the corporation not only received conveyances of property to it, but made conveyances from it. That it owned a building in which the professors (of which the testator was one) gave lectures, and that it was recognized by the persons in charge of Georgetown University as a corporation capable of receiving property and contracting. In fact the defendants were in a quasi-partnership with it, in that they were interested in the tuition fees and conferred the degrees. A synopsis of a contract between "The President and Directors of Georgetown College" and this "Medical Faculty" shown by the context to be these same incorporators of the "Company of the Medical Department of Georgetown University" is set out in the minutes of the proceedings of the Board of Directors of Georgetown College for Dec. 27, 1893. (Rec., 63).

It shows that at least during a period of five years mentioned therein the professors who had organized and were conducting the medical school (outside of a stipulated amount from the receipts of

the school, paid to the President and Directors of Georgetown College), took all the profits and income of the school to be divided among themselves as salaries and otherwise.

The charter of "The Company of the Medical Department of the University of Georgetown," Exhibit H (Rec., 67) shows that it was not a charitable institution but a stock company having issued 210 shares of stock of the par value of $21,000.

When the building, however, had been paid for by "The President and Directors of Georgetown College" it seems that they took over the medical school. It ceased to be operated under its charter and its incorporators allowed its charter to lapse. (Testimony Father Dougherty, Examiner's Record, p. 75. Admission of Colbert, Rec., 29, 30.)

But the new operators of the medical school did not cease to operate it for profit, as is shown by the schedule of fees charged for the medical course. See Catalogue of 1900-1901, p. 115, and Catalogue of 1899-1900, p. 118.

It is true that since testator's death the College of Medicine has been operated by "The President and Directors of Georgetown College," under claim of the grant of university powers in the Act of Congress of 1815, but it was not so at the time of the making of the will.

The Law School and Dental School.

Father Dougherty testified (Rec., p. 71) that th
was in operation as part of "Georgetown Uni
sity" a "Law Department" and a Dental Dep
ment. These departments were operated with
any separate charter. (Rec., p. 29.) The catalo
of the university for 1889-90, pp. 3 and 14, st
that the college of law was founded in 1870.

The Theological Department.

Father Dougherty testified (Rec., p. 33) that
to the year 1869 there was a course especially
theology in Georgetown University in the Dist
of Columbia. That in that year the theological
lege was removed from Georgetown to Woodsto
Maryland, "that now has its own charter. It
looked upon as a portion of Georgetown, but has
own charter."

Between the year 1817 and 1901, as shown
page 90 of the catalogue of 1900, the degree of D.
was conferred by the university twenty-seven tim

Since the Theological Department was actually
part of Georgetown College certainly from 1833
1869 this is conclusive on the question that the rel

ious institution recognized as a corporation by the Acts of Congress of 1815 and 1833 did not in fact accept the Act of 1844 as cutting off their claims to corporate authority in matters of religion under the Maryland Acts and the Acts of Congress of 1815 and 1833.

Religious and Denominational Character of Georgetown College.

That a gift to Georgetown University for endowment of its literary department would be a gift to the use of a religious order and denomination and teacher of the Gospel and the doctrinal religion of a sect within the meaning of the prohibition of Bill of Rights, will be apparent from the following evidence:

"This college was the first Catholic institution of higher learning founded in the United States" (Catalogue 1889-90, p. 14, Exhibit B).

"The course of studies at Georgetown is that generally pursued in College of the Society of Jesus" (Catalogue 1889-90, p. 15).

The special mission of the Society of Jesus is to "teach and defend religion" (History of Catholic Church, Noethen, p. 501). (Rec., p. 35.)

"The only object of the Society is to get a little religion into men" (Testimony of Father Dougherty, Rec., p. 35.)

"The Society of Jesus is a religious order founded by Saint Ignatius and like all orders approved and directed by the Pope" (Testimony of Father Dougherty, Rec., p. 38.)

"A certain portion of the Sociey of Jesus got together and formed this corporation" (Testimony of Father Dougherty, Rec., p. 36).

"The President and Directors have always been Jesuit since its charter" (Testimony of Father Dougherty, Rec., 30, and minutes of Board, 1844 to 1901. Rec., 49 to 66, 77).

Under the rules of the Society the incorporators are not even free agents, and the control is absolutely fixed in the Society of Jesus.

FATHER DOUGHERTY testified on this point as follows:

> "The Board of Directors appoint themselves. In order to maintain the corporate existence of the college, if one man has to leave, and as Jesuits we have to leave when we receive orders, another man is elected; and the one who has to leave resigns and the new man takes his place" (Rec., p. 72).
>
> "Of course there are certain positions in the house, such as the President, the Treasurer and the Secretary, who are appointed. This is the way it is done. For instance, if a man is in bad health, who is one of the Board of Directors, the Superior will say: 'You will have to let Father So-and-So go at the end of the year.' I will say: 'That is all right, you send me a man.' When it comes to the end of the year in July, I have a meeting of my board and this man is proposed as a member of the board. Then the man who is to be removed sends in his resignation and that is accepted. That is the way we do it." (Rec., p. 78.)

FATHER DOUGHERTY further testified (Rec., p. 93):

> "Q. The professors and the lay brothers who assist in and about the college work are chosen by the Board, as I understand it?
>
> A. They are chosen in part by the Board. When you come to ask a big question like this, you must remember that I have to run two things. I am the rector of the religious community as well as President of the College. * * * They are so many men billeted to me, so many assigned to that community, and the

Superior sends those men there. Of course I try to put the men where they will do the most good."

Georgetown College has been under the control of the Society of Jesus ever since its foundation (Testimony of Father Dougherty, Rec., pp. 6, 15, 92, catalogue 1889-90, p. 14).

The catalogues of the College in evidence correctly set out the practice and teaching of the College (Testimony of Father Dougherty, Examiner's Rec., pp. 8-90-91).

Father Dougherty testified as to the teaching of religion in the higher courses of the Literary Department as follows (Rec., p. 72):

"A. That is a more advanced order of lecture.

Q. Once a week, you say?

A. Yes, sir.

Q. On what subject?

A. On Christian doctrine. They generally divide the whole Christian doctrine into three portions, and then they treat each portion. One year they treat the creed, which is dogmatic. The next year they treat the sacrament, and the third year they treat the commandments. In that way they go over the matter once every three years.

Q. In the delivery of that course of lectures, is the subject-matter based upon the doctrine and tenets of the Catholic religion?

A. Yes."

The Practice of Religion.

It is true FATHER DOUGHERTY testified (Rec., 70), as follows:

"Q. Have you any school of theology connected with Georgetown College?

A. No, we have not."

Again (Rec., 37):

"Do you teach theology at the school?
A. No."

Again (Rec., 37):

"Q. Have you any theological department connected with Georgetown College?
A. Not strictly speaking."

Again (Rec., 70):

"Q. What is the business of Georgtown College; what is the reason of its existence?
A. It is to teach young men directly as in any other college. We have the classical course. That is the only course we teach in the college. The other objects are, as I stated before, to give these boys a good example, to try to instill good principles into them and if possible to help them to save their souls."

It is apparent, however, that the good father is endeavoring to draw the distinction between what is taught in what he denominates strictly "Georgetown College" and what he denominates "Georgetown University," a distinction which we are contending for. In no other way can we reconcile his statement above "That we have the *classical course*, that is the *only course* we teach *in the college*" with his testimony elsewhere as follows (Rec., 70):

"The university is composed of the college, or the undergraduate course, as I call it, of the medical department, which is now composed of two departments, the dental and medical; and the law department."

That Father Dougherty makes in his testimony a distinction between the "college" and the university is shown by a correction he made to his testimony (Rec., 75) as follows: "What I wish to add to this

Most Sacred Master Gregory XVI, with prayers, His Holiness beningly assented to confer the *faculty* of granting such degrees to the *College of the City of Georgetown of the Society of Jesus.*

"Given at Rome, 30 of March, 1833."
Rec., pp. 95, 96.

See the decree set out in Latin in the catalogues in evidence, and the claim in the catalogue for 1889-'90, Exhibit B, pp. 3 and 14, that the University was then (1890) claiming the right to grant degrees in Philosophy and Theology under this papal decree.

University Defined.

FATHER DOUGHERTY claiming to be the President of Georgetown University (Examiner's Record, p. 69) in response to questions by his counsel testified (p. 70):

"Q. Will you please tell us what is the difference or distinction between a college, so-called, and a university?

A. In order to define a university, we have to take either the German idea or the ordinary idea that we have of a university. Cardinal Newman says that a university, according to his idea, is a place where universal knowledge is taught. Our idea of a university, generally, is that it is a combination of schools in which the professions, usually law, medicine and theology are taught, and in which there is also an undergraduate department. In England, Oxford University, for instance, as you know, is merely an aggregation of colleges."

The legal definition:

"A university is an institution of higher learning consisting of an assemblage of colleges united under one corporate organization and government, affording instruction in the arts, sciences and the learned professions, and conferring degrees.

A college is an organized assembly or collection of persons established by law, and empowered to co-operate for the performance of some special function, or for the promotion of some given object, which may be educational, political, ecclesiastical or scientific in its character."

27 A. & E. Ency. Law—"University"—p. 682. Black's Law Dictionary.

College of Liberal Arts and Sciences Chartered 1844.

On June 10, 1844, Congress passed an act entitled "An act to incorporate Georgetown College, in the District of Columbia" (6 Stat. L., p. 912), which enacted as follows:

"Sec. 1. That there be erected, and hereby is erected, in Georgetown, in the District of Columbia a college *for the instruction of youth* IN THE LIBERAL ARTS AND SCIENCES, the name, style and title of which shall be '*The President and Directors of Georgetown College.*'

"Sec. 2. And be it further enacted, That James Ryder, Thomas Lilly, Samuel Barber, James Curley, and Anthony Rey be, and they

are hereby declared to be, a body politic and corporate with perpetual succession in deed or in law to all intents and purposes whatsoever, by the name, style and title of "The President and Directors of Georgetown College" by which name and title they and their successors shall be competent at law and in equity to take to themselves and their successors, for the use of said College, any estate whatsoever, in any messuage, lands, tenements, hereditaments, goods, chattels, moneys, and other effects, by gifts, bequest, devise, grant donation, bargain, sale, conveyances, assurance, or will; and the same to grant, bargain, sell, transfer, assign, convey, assure, devise, declare to use and farm, let, and to place out on interest for the use of said college, in such manner as to them, or a majority of them, shall be deemed most beneficial to said institution; and to receive the same, their rents, issues and profits, income and interest, and to apply the same for the proper use and benefit of the said college; and by the same name to sue and be sued, to implead, be impleaded in any courts of law and equity in all manner of suits, actions, and proceedings whatsoever, and generally by and in the same name to do and transact all and every the business touching or concerning the premises; Provided, That the same do not exceed the value of $50,000 net annual income, over and above and exclusive of the receipts for the education and support of the students of said college.

"Sec. 3. And be it further enacted, That the said corporation shall adopt a common seal, under and by which all deeds, diplomas and acts of the said college or corporation shall pass and be authenticated, and the same seal at their pleasure to break and alter, or devise a new one.

Sec. 4. And be it further enacted, That no misnomer of the said corporation shall defeat or annul any donation, gift, grant, devise or bequest to or from the said corporation.

"Sec. 5. And be it further enacted, That the said corporation shall not employ its funds or income, or any part thereof, in banking operations, or for any purpose or object other than those expressed in the first section of this act; and that nothing in this act contained shall be so construed as to prevent Congress from altering, amending, or repealing the same."

The first section of the Act authorized the erection of a college

"for the instruction of youth in the liberal arts and sciences."

The fifth section of the Act provided:

"That the said corporation shall not employ its funds in banking operations, or for any purpose or object other than those expressed in the first section of this Act."

The term "Liberal Arts and Sciences" is a well understood term in the field of college education. It is defined by Webster as follows:

"The liberal arts, the higher arts, which among the Romans, only freemen were permitted to pursue, were in the middle ages, these seven branches of learning: grammar, logic, rhetoric, arithmetic, geometry, music and astronomy. In modern times the liberal arts in-

clude the sciences, philosophy, history, etc., which compose the course of academical or collegiate education."

See Webster's Dictionary—titles "Art," "Science" and sub-titles "liberal arts."

The distinction between the "Liberal Sciences" and "Incretive Science" is thus pointed out in the Standard Dictionary:

"*Liberal Sciences*—A science naturally pursued for the love of knowledge not from mercenary motives.

"*Incretive Science*—Professional science, a science followed for its financial returns."

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Medical School.

Charter of 1886.

In the year 1886 there was chartered in the District of Columbia under general laws an institution under the name of

"The Company of the Medical Department of Georgetown University." The charter was produced and offered in evidence, Exhibit H, to (Rec., 29 and 67).

The medical and dental schools of the university were for a time conducted under this charter.

FATHER DOUGHERTY testified (Rec., 75):

"Q. Your medical department has a separate charter which we put in evidence, has it not?

A. The medical department, at the start, had a charter of its own. I told you, if I mistake not, that the reason for that was that we did not have the money to put up a building for the medical school; some doctors got together and formed this body in order to hold the property in which they gave their lectures. We afterwards bought that property from them and assumed all their indebtedness and the charter by which they held the land lapsed. We always gave the degrees in the medical school. They never had any charter to give degrees in medicine and we always did that. The only purpose for which the charter was obtained was to hold this property of which I have spoken."

The purposes of the charter are, however, best evidenced by what is stated in the charter itself, and what the corporators did under it.

Now it is true that Mr. Colbert, counsel for defendants, made the statement in connection with his production of the charter of the "Company of the Medical Department of Georgetown University" that "There has been no organization, and no user under this charter. I do not know who got this up." But this is not evidence, at best it is admission of counsel as against defendants. The record shows the facts to be otherwise.

FATHER DOUGHERTY testified (Rec., 30):

Mr. Colbert:

"Q. And there was a conveyance of that property on H street to this corporation?

Father Dougherty: Yes.

college, to creat. a new corporation, which should confine its holdings of property and its teaching for the instruction of youth in the liberal arts and sciences only. It did not undertake to destroy the large holdings of the old corporation for pious uses and its vested rights to teach the Catholic Religion, recognized in the Maryland Acts of 1792 and 1796, and Acts of Congress of 1815 and 1833.

Indeed, there is no evidence that the old corporation ever transferred its property rights to the new corporation or ever intended to do it. On the contrary, we find the old institution running side by side with the new, long after the charter of 1844—teaching law, medicine and theology,—and up to the testator's death claiming the right to exercise corporate university powers under the Act of Congress of 1815.

In a similar case in Maryland it was held that the later act created a *new* corporation and did not destroy the old corporation.

> *Regents, etc., University of Maryland* v. *Williams,* 9 G. & J. (Md.), 365.

There is nothing singular in the fact that Georgetown University is composed of several distinct corporations. It was held to be so in regard to the University of Maryland. And in that case the court referred to a similar condition in the English Universities in the following language:

> "So in the cases of the Universities of Oxford and Cambridge, of which the many colleges (distinct and separate corporations) within those Universities form a component part of those larger corporations."
>
> *Regents, etc.,* v. *Williams,* 9 Gill. & J., 365-393. (Decided 1838.)

The Act of Congress of March 1, 1815, is not only claimed to be the charter of the University in the Catalogue of 1889-90, but it is set out in full in the University Catalogue of 1899-1900, at page 17, in evidence.

Indeed, it is under the powers conferred by the Act of Congress of 1815 that "the President and Directors of Georgetown College" *now* claim the right to confer degrees in law, medicine and theology. It was so claimed by their counsel in the lower court and will doubtless be so claimed in this court. The most novel legal proposition is, however, asserted by said counsel in reference thereto:

It is asserted that all the powers conferred by the Act of 1815 are kept ali ad fall like a mantle upon the shoulders of whomsoever are "the President and Directors of Georgetown College," the institution chartered in 1844. We insist that if this view is to be accepted, then the Act of 1815 must be taken in connection with the Act of 1844, and if so taken it enlarges the charter of 1844 to University dimensions, and confers upon the institution the power to teach and confer degrees in law, medicine and theology.

And if that be true, the contention that only the charter of 1844 can be looked to, to define the powers and purposes of the institution must fall to the ground. They cannot claim the powers under the Act of 1815 for one purpose, and hide behind the Act of 1844 on the pretense that their acts outside the charter limits of 1844 are *ultra vires,* and that nobody but the State can take advantage of it.

MISNOMER.

There is no doubt in this case that the testator intended by the term Georgetown University, the institution of learning which, ever since the year 1815, has been conducted as a university in the name of "The President and Directors of Georgetown College." There is not a scintilla of evidence to show that the testator ever knew of the charter of 1844, or intended to devise anything for the limited purposes authorized by the charter. On the contrary, the fact that the charter of 1844 does not provide for the teaching of the professions, and that his devise was:

> "To Georgetown University, in the District of Columbia, to be an endowment in equal shares of the literary and *Medical* Departments thereof,"

would seem to show conclusively that he did not have in mind an institution with the limited powers contained in the charter of 1844.

The institution which testator intended to benefit was the institution which he knew, the institution which claimed for itself in 1889-90, in the catalogue in which his name appears as professor in the Medical Department, that it possessed university powers under a charter granted by Congress in 1815.

If he did not intend that, then the only corporation which he could have intended to receive the endowment for the Medical Department, must have been the "company of the Medical Department of Georgetown University," chartered in 1886, but whose charter lapsed after testator's death.

The only *oral* testimony in evidence offered to show what institution the testator intended by use of the term "Georgetown University" occurring in his will is the following:

Father Jerome Dougherty, called as a witness on behalf of the defendants, testified that he was the President of "Georgetown University" (Rec., 69), and in response to questions propounded by his counsel he testified (Rec., 72) as follows:

> "What is the popular name of the institution whose corporate title is 'The President and Directors of Georgetown College,' how is it generally known in this community and throughout the United States?
>
> A. It is known as Georgetown University, I think.
>
> Q. Or the University of Georgetown?
>
> A. Yes, or the Varsity.
>
> Q. Is it sometimes known as Georgetown College?
>
> A. Yes; or as simply 'Georgetown.' If you will look in the papers you will find it referred to as Georgetown if there is any talk about schools, just the same as they refer to 'Harvard' and 'Pennsylvania' and other places. They simply say 'Georgetown.' They are brought in together."

We do not take issue on any of the above statements. Our contention is that the institution conducted in the name of "The President and Directors of Georgetown College" was, at the time of the making of the will, and had for years been conducted not within the limits of the charter of 1844, but as a university; teaching law, medicine, literature, theology and denominational religion under claim of existing charter rights created or recognized by the

Acts of Congress of 1815 and 1833. That even now it claims the right to confer degrees in law, medicine and theology under the Act of 1815. That whether that assumption be warranted in law, or whether it be a mistake of law on their part, as held by Judge Hagner (Rec., 102), the fact still remained that they were operating this institution as a university under a claim of a right to do so under the Act of 1815 as a charter granting to them university powers. It was this institution, so operated and so claiming to exist as a university under the Act of 1815, that the testator knew and intended when he used the term "Georgetown University" in his will.

If as Judge HAGNER held (Rec., 102), the Act of 1844 repealed and superseded the Act of 1815, and that those in charge of the institution had been for years operating the institution under a mistaken idea that it was a corporation chartered by the Act of 1815, that fact would not go to show that testator *intended* his gifts for the institution chartered in 1844, which had no university powers. It would simply show that he intended the bequests for a *de facto* university.

The charter of 1844 merely authorized the instruction of youth in the "liberal arts and sciences",

> "it is well settled that such a charter would not authorize the conduct of a medical college."
>
> *People* v. *Gun*, 96 N. Y., 317.

That one-half of the devise in clause (b) of the will was for endowment of the medical department of the university, shows conclusively that testator did not have the charter of 1844 in his mind, nor

did he have in mind an institution operated or to be operated within the limits of that charter. If he did so intend it that half of the bequest must necessarily fail because under the charter of 1844 that institution would have no power to receive the gift.

ENDOWMENT FOR THE MEDICAL DEPARTMENT.

The bequest in clause (b) of the remainder interest in the testator's individual estate is to "Georgetown University," * * * "to be an endowment in equal shares of the Literary and Medical Department thereof."

The testimony of Father Dougherty is to the effect that the teaching of medicine in the institution is designed to prevent the teaching of certain theories deemed obnoxious from a religious point of view. It must, therefore, necessarily be true that the views they teach are in consonance with the religious views of the Order, even in the Medical Department.

He testified (Rec., 37):—

"The only reason that we have those (departments) is, as I say, there are certain subjects, you know, in law, where we want things given properly, and so there are certain things in medicine that we want explained properly, and for that reason we have these departments of law and medicine, not for any particular doctrine, but just to keep out bad theories, both in law and medicine."

Again (Rec., 36):—

"The object and aim of Georgetown College, as of all other colleges, is to teach men a certain amount

of human knowledge, and also, *when we have the opportunity of conveying the view we hold,* and by our discipline and example to urge them on in their spiritual life. In other words, to save their souls."

(1) If this bequest be considered as intended for the corporation claimed in the Catalogue of 1889-90 to be a University chartered and recognized as such by the Acts of Congress of 1815 and 1833, the bequest, even to the Medical Department, would be a gift to or for the benefit and in ease of a denomination or religious order, and would therefore fall within the prohibition of the bill of rights.

(2) If, on the other hand, there be no charter other than that of 1844 for instruction of youth in the "liberal arts and sciences", the gift for the endowment of the Medical Department would be a gift to a medical college without a charter, and therefore be void, or it would be a gift to a literary college not empowered to receive such a gift for such a purpose.

People v. *Gunn,* 96 N. Y., 317.

(3) If, on the other hand, the bequest for endowment of the Medical Department of Georgetown University be considered as a gift to "the company of the Medical Department of Georgetown University", chartered in 1886, and whose charter lapsed the year after testator's death, the gift would also lapse.

The Supreme Court of Massachusetts held:

> "A legacy to a medical institute already in existence, but a private pecuniary enterprise, is not a bequest to a public charity, and in case the beneficiary ceases to exist before the will

takes effect, the Court will not apply the gift *cy pres.*"

Stratton v. *Physio-Medical Inst.*, 148 Mass., 505, 5 L. R. Anno., 33.

"A bequest to a Sunday-school to be used in making Christmas presents is not a charitable bequest."

Goodell v. *Union Asso.*, 29 N. J. Eq., 32.

"The Court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society."

2 Pomeroy's Eq. Jur., 1019, note and cases cited.

"According to the uniform course of decisions in this State (Maryland), a trust cannot be upheld unless it be of such a nature that the *cestui que trusts* are defined and capable of enforcing its execution by proceedings in a Court of Chancery."

Church Ex. M. E. Church v. *Smith*, 56 Md., 397.

Accordingly it was held in that case:

"That a bequest to a Church Extension Fund, a corporation, to be used as part of the perpetual loan fund, as the said fund consists of a fund to be loaned to necessitous churches, the bequest becomes a gift, not to the corporation for its own use, but to it as trustee for this class of indefinite beneficiaries. And that a bequest to an unincorporated association is void, as there is no *cestui que trust* who can enforce its execution in equity.

Idem.

is, in the answers I exclude the medical and law schools. This applies merely to the *college proper.*"

(Rec., 33, 34):

"Q. There is a course especially for theology in Georgetown, is there not?

A. Not at present; there was, but they moved away in 1869. That now has its own charter; it is looked upon as a portion of Georgetown, but it has its own charter, and has been removed to Woodstock, Md."

NOW AS TO THE PRACTICE OF RELIGION IN THE SO-CALLED CLASSICAL DEPARTMENT.

FATHER DOUGHERTY testified (Rec., 33):

"Q. On page 28 of the sam ecatalogue (1889-90) under the head of 'General Regulations' I read this:

'No distinction is made in the reception of students on the ground of religious belief, but all the boarders are required to be present at the public exercises of religion.' That is correct, is it?

A. Yes, sir.

Q. It is the public exercises such as are held in your chapel?

A. Such as are held in chapel, which calls them all together for general good, and this we do merely as a matter of discipline. They are not obliged to *attend* the services; not compelled to take part, *only merely to be present at those services*, and that is a matter of discipline.

Q. And that is the exercises of the Catholic Church?

A. Yes, sir."

The good father here attempts to draw a distinction between the requirement "to be present" and

being obliged to "attend" the esrvices of the church.

However, it would seem that he abolishes this distinction in his testimony (Rec., 37) where he says:

> "But a certain amount of religious training he will get; it is simply in the atmosphere in which he lives."

And at page 34:

> "The only object of the society is to get a little religion into men."

THE TEACHING.

Catalogue 1889-90, p. 18:

"RELIGIOUS INSTRUCTION."

> "Religious instruction is considered of the first importance in education. *Catechism* forms one of the *regular* class recitations, and weekly catechetical lectures are attended by all. The prize for Christian Doctrine is awarded to the author of the best paper upon the matter of these lectures. Further instruction is given to such as have need for it or are preparing for the Sacraments.
>
> For the development of piety there are two sodalities, which meet weekly. All Catholic students are expected to approach the Sacraments at least once a month."

Now as to the text books taught in the so-called classical course.

(Catalogue 1889-90, p. 26):

"SCHOOL OF ARTS AND SCIENCES."

"PREPARATORY DEPARTMENT."

In "Third Grammar" Class, and "Second Grammar" Class, and sub-head "English" one of the text books stated to be taught is "DE HARBE'S FULL CATECHISM."

(Same Catalogue 1889-90, p. 22):

"DEGREE BACHELOR OF ARTS."

Freshman year—"De Harbe's Full Catechism completed."

This text book is taught as a constituent part of the college course (Testimony of Father Dougherty, p. 33). It is in evidence as Exhibit K, which is made a part of the record on appeal. (Rec., 158.)

It is entitled:

"A FULL CATECHISM OF THE CATHOLIC RELIGION."

A most casual glance at the subjects treated in the catechism as indicated in the statement of "contents" will show that whoever teaches it, is a teacher not only of the "Gospel" but especially of the denominational doctrine of the Catholic Church.

For instance:

"Chronological succession of the Popes."
"Christian doctrine."
"On Faith."
"On the Apostles' creed."
"On the Commandments."
"On the means of Grace."
"On the Sacraments."
"On the real presence."
"Confession."
"Indulgence."
"On the Angelical Salutation," etc., etc.

The context will show what FATHER DOUGHERTY said for it (Rec., 33), that as a catechetical exposition of the doctrine of the Catholic Church, "it is one of the best".

But how can it be successfully contended in the face of this, that the College is not a teacher of the

Gospel, and that a gift to it would not be for the benefit of a denomination or sect?

Again—(Catalogue, 1889-90, pp. 22-23):—

FOR DEGREE OF BACHELOR OF ARTS.

Under sub-head "English" the course of study prescribed embraces:

> "Doctrinal Exposition of Religion:
> Church History lectures based on Noethen."
> The text book so taught (Testimony of Father Dougherty, Examiner's Record, p. 33). "HISTORY OF THE CATHOLIC CHURCH—NOETHEN," is in evidence as Exhibit "J".

An examination of its contents will show that it is a complete exposition of the history and doctrines of the Catholic Church from the standpoint of that Church, more complete than any Priest could make from a pulpit.

From the opening chapter on "THE PROGRESS OF THE GOSPEL" to the concluding chapters on the doctrines enunciated by the great church councils, it is essentially a teaching of that religion.

Again (Catalogue 1899-90, p. 78):—

"UNDERGRADUATE SCHOOL."

One of the prescribed text books on Christian Doctrine is "THE HAND BOOK OF THE CHRISTIAN RELIGION," by Wilmer S. J., for both Junior and Senior years.

It is in evidence as Exhibit "L".

FATHER DOUGHERTY testified as to it (Rec., 33-34) as follows:

> "That is the book taught in the upper classes, as it is more scientific in its character, not of a catechetical form, but the regular theological form."

No one can examine this text book and say that theology, and especially Catholic Theology, is not taught in the so-called classical courses of Georgetown College.

Again (Catalogue 1899-90, p. 51):—

Under the head of the "GRADUATE SCHOOL" it is stated:—

> "*Students for the Church can extend and complete the Philosophy they have begun in their last college year,* and thus prepare the main requirements for entrance into Theology."

THE CLAIM OF THE UNIVERSITY OF CORPORATE EXISTENCE OUTSIDE OF THE ACT OF CONGRESS OF 1844.

We have already referred (*ante*, p. 35-36) to the claim of the University in the Catalogue of 1889-90, being the last one issued prior to testator's death, and in subsequent catalogues, of its charter as a University by the Act of Congress of 1815, and to the Act of Congress of 1833, recognizing the institution under the name of "The President and Directors of Georgetown College" as a corporation. That the corporation so recognized was in fact a branch of the "Corporation of Roman Catholic Clergymen" there can be no doubt. But the territory in which that corporation had its existence had been dismembered by the cession of that part of the State of Maryland in which the college was established to the

United States. Within the District of Columbia it was competent for the United States to deal with the corporate rights and franchises of that corporation at least with its assent.

The recognition of the corporation by the Acts of 1815 and 1833, in the name of "The President and Directors of Georgetown College," was sufficient to confer that new name upon the old corporation, or, indeed, to have created it a corporation if it were not a corporation previously.

> "An old corporation may acquire a new name by reputation and usage."
>
> 7 A. & E. Ency. Law, 685, 2d Ed.

> "A doctrine frequently admitted by American courts is that where a body of persons act as a corporation, and the Legislature passes an act which distinctly recognizes their corporate character, they may be deemed to be rightfully a corporation in consequence of such legislative recognition."
>
> 1 Thompson, Com. on Corp., Sec. 512.
>
> *Bosshor* v. *Dressel,* 34 Md., 503.
>
> *People* v. *Perrin,* 56 Cal., 345.

Nor does the fact that certain individuals connected with the old corporation were incorporated under the same name by the Act of 1844, with other and more limited powers repeal the old charter. It simply created an additional corporation with the same name.

> *Snook* v. *Ga. Improvement Co.,* 83 Ga., 66.

There was no reference in the Act of 1844 to the old corporation. That act purports to erect a new

bition against the college engaging in the teaching of theology or religion, he reached the conclusion that if the institution was in fact engaged in the teaching of theology or religion, it was *ultra vires* the charter, and that on authority of *Bradfield* v. *Roberts*, 175 U. S., 296, only the State could question the right of the college to take under the will, and *declined to pass upon the evidence* in the case, which showed conclusively that the institution as conducted now and at the time of the making of the will was doing the things which, if done under corporate authority, would in his opinion have brought it within the prohibition of the bill of rights. (Rec., 104.)

For these reasons Judge HAGNER sustained the validity of the devise designated as clause (b) of the will.

The view taken by the Court of Appeals of the District of Columbia.

Mr. Justice ALVEY, expressing the opinion of the court on this point, reached the same conclusion. He said (Rec., 134):—

> "The college is not a religious institution intended for the tuition and propagation of a particular doctrine and creed of religious belief, to the exclusion of all other creeds and beliefs, but is an institution of learning for the admission and education of students of all denominations of religious faith."

We would be utterly at a loss to understand how in the face of the evidence in this case, the learned Judge could have reached such a conclusion as that stated, were it not that he immediately follows it with a further statement which shows that *he, too, refused to consider any evidence on the subject other than* what might appear on the face of the *charter of* 1844. He continues (Rec., 134-5) :—

> "The act of incorporation of the college does not *limit* the exercise of the corporate powers conferred to the promotion of any *particular* religious creed or denomination; but the college is open to all alike. For the limitations of the powers and objects of the college, we must look to the charter granted by Congress and not elsewhere."

He further continues (Rec., 135) :—

> "The objection urged would seem to be fully answered by the decision of the Supreme Court of the United States in the case of *Bradfield* v. *Roberts*, 175 U. S., 296."

We can readily understand how under Judge HAGNER's view of the limited scope of the teaching comprehended by the term "liberal arts and sciences" used in the charter of 1844, and under his further view that the case of *Bradfield* v. *Roberts*, 175 U. S., 296, precluded him from inquiring into acts and teachings of the college *ultra vires* its charter, he could logically reach the conclusion on that premise that the gift of that half of the bequest to the Literary Department would not be obnoxious to the Bill of Rights. But precisely the same premise ought, we respectfully submit, to have led him to the conclusion that the other half for endowment of the Medi-

cal Department was void because it was a gift for an express purpose—*i. e.*, teaching a profession, which, he holds (Rec., 102), is not in the scope of the charter of 1844.

On the other hand, we are utterly unable to understand how the Court of Appeals on the premises laid down by them could have reached the conclusion they did in regard to the gift for the endowment of the Literary Department.

That court, in order to save another bequest (to be considered later), differed from Judge HAGNER's view that "liberal arts and sciences" was used in the Act of 1844 in the limited technical sense in which the words were construed by Judge HAGNER. They construe the word "sciences" by itself. In the opinion Mr. Justice ALVEY says (Rec., 137):—

> "The term science is of a very large meaning in an educational point of view. Acknowledged truths and laws, in any department of mind or matter, digested and arranged into a system; a profound or complete knowledge of all acknowledged truths *relating to any subject-matter.*"

We respectfully submit that if the word "sciences" used in the charter of 1844 is to be construed as severed from its connection with "liberal arts," and if it be given the independent effect given it as above stated by the Court of Appeals, that the word is broad enough to cover the teaching of theology and religion, and that therefore the holding of the Court of Appeals that they would not go into the evidence to see what the teachings of the institution actually were, and that the charter itself did not authorize the teaching of denominational religion,

and that the case of *Bradfield* v. *Roberts* limited the inquiry to the charter, must fall to the ground.

> "The sciences are divisible into
>
> "(1) The mathematical treating of quantity. (2) The physical treating of matter and its properties. (3) The biological treating of the phenomena of life. (4) The anthropological treating of man; and (5) The theological treating of the Deity."
>
> See Standard Dictionary—Science.

We think, however, that the view of Judge HAGNER is correct, that the words "liberal arts and sciences" in a college charter have a technical sense. "Liberal arts" and "liberal sciences" were time-worn phrases in college history.

> "*Liberal Sciences*—A science naturally pursued for the love of knowledge, not from mercenary notives.
>
> "*Incretive Science*—Professional science, a science followed for its financial returns."
>
> See Standard Dictionary—Science.

> "*Liberal Arts and Sciences*, such as are fit for gentlemen and scholars; as mechanick trades and handicrafts are for meaner people."
>
> Bailey's Etymological Dictionary, 1740.

We respectfully submit that it is illogical to give the words "liberal arts and sciences" a technical limited construction in considering one clause of the will, so as to claim that if the corporation is in fact teaching religion it cannot be inquired into because it would be *ultra vires* the charter, and then in order to save another bequest in the will to construe the words differently and broad enough to comprehend the teaching of everything within the range of human knowledge.

CASE DISTINGUISHED.

The case at bar is to be distinguished from
case of *Bradfield* v. *Roberts*, 175 U. S., 291, in
following important particulars:

(1) A different statute, as creating a public p
icy, is invoked in the case at bar, viz.: that co
prised in the Bill of Rights as amended by Sect
457, R. S., of the District of Columbia. A stat
which is intended to protect those who have natu
social claims upon a person's bounty, from the
due influence, through fear, or through hope of
ward in the next world, which Denominational
ligion may have over the mind of such person wh
the end of life is at hand. In the Bradfield case
only question was whether the making of a contr
by District of Columbia Commissioners, with a h
pital operated by persons of Roman Catholic fai
for the nursing of the sick, was equivalent to a l
by Congress "establishing" the Roman Catho
Religion in contravention of the First Amendm
to the Constitution.

(2) In the Bradfield case there was a contract
the specific purpose, and no other, of nursing
sick, and made with, and in the chartered name
the Providence Hospital, a corporation charte
for the especial purpose of nursing the sick, and
other.

While in the case at bar:

There is no bequest in name to "the President a
Directors of Georgetown College," the corporati
chartered in 1844. Nor does the evidence indic

that the testator had that charter in his mind. On the contrary, the bequest was to the "University of Georgetown," an institution which was being operated, in fact, and which, at the time the will was made, was claiming to exist under an alleged charter granted by Congress in 1815.

Nor was the bequest limited to the specific purposes for which the charter of 1844 was granted to "the President and Directors of Georgetown College." It was in fact partly for the endowment of the "Medical Department" of the "University of Georgetown."

(3) In the Bradfield case the Court said:—

> "There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree."

In the case at bar:—

The evidence is conclusive that the "Literary Department" of "Georgetown University," as testator knew it, and which, as he knew it, was the object of his bounty, was not in fact operated within the limits prescribed for the institution chartered in 1844, but was in fact being operated as a denominational and religious school, and claiming a right to do so, not under the charter of 1844, but under a religious charter granted by the Pope in 1833, and under the claim that a charter with university powers had been granted by Congress by the Act of 1815.

While it is true that the institution does not confine its educational work to members of the Catholic

Church, the catalogues in evidence show that it is a *prescribed rule*, that no student in the literary or so-called classical department, can obtain a college degree without taking a course in what is called "Philosophy," degrees in which were authorized by the charter of the Holy See in 1833, and which is a protracted course, through text books and by lectures, in the Doctrinal Religion of the Catholic Church. It is also prescribed that every inmate of the college must personally attend the public exercises of that religion. So that as a matter of fact every graduate from the Literary Department must have become educated both in the doctrines and in the practice of that church, whether he has become a Catholic in faith or not.

The question in the case at bar is, whether the bequest is to a teacher of religion as such, or for the benefit of a religious denomination or order. There was no such question in the Bradfield case.

In an Illinois case:—

The charter of the Industrial School was held to be regular and the purposes expressed in the Act under which it was chartered secular only. The school was in fact under control of sectarian societies, and sectarian doctrines were taught as in the case at bar. Under a county appropriation such industrial schools were entitled to so much from the county for each scholar taught. The county's defense was the constitutional prohibition against the use of public funds for religious or sectarian purposes. The contention was set up as it is in the case at bar, that if the Industrial School in its teaching

violated its charter only the State could interfere by *quo warranto* or *scire facias*. The Court in overruling this contention said:

> "The defense is grounded more upon this constitutional prohibition as controlling the defendant in the suit, than upon such want of power or abuse of power as affects the position of the plaintiff in the suit."
>
> *Cook Co.* v. *Industrial School*, 125 Ill., 541-564.

So in the case at bar, the prohibition controls the power of the *testator* to make a valid devise to be used for such purposes and the principles invoked by the defense do not apply.

Lapsed Residuary Legacy and Devise.

The devise and bequest in clause (b) of the will, if void, being in the residuary clause relating to testator's individual estate, pass to heirs-at-law and next of kin. That is to say, the real estate passes to the heirs-at-law and the personal property to the next of kin.

1 Perry on Trusts, Sec. 160, 160a.

While the rule is different in some other States, when the gift is for a *strictly charitable use*, we know of no exception to it, where the beneficiaries do not fall within that class.

> "So a trust for benevolent purposes was not sustained, as benevolence may or may not be charitable in the law."
>
> 2 Perry on Trusts, Sec. 711.
>
> *James* v. *Allen*, 3 Mer., 17.
>
> *Norris* v. *Thompson*, 19 N. J. Eq., 311.

> "For the same reason, where a bequest was made to the Bishop of Durham in trust for such objects of benevolence and liberality as he should approve, the Court held that the fund could not be administered as a charity, and ordered it to be paid over to the next of kin. These cases all proceed upon the maxim, that the trust to be valid must be under control of a court, and the trust must be of such a nature that its administration can be reviewed."
>
> 2 Perry on Trusts, Sec. 711.
>
> *Morice* v. *Bishop of Durham*, 9 Ves., 399; 10 Ves., 522.

Lord BROUGHAM states the distinction in those jurisdictions where the doctrine of charitable uses is recognized thus:

> "If the intention be charity, the Court will execute it, however vaguely the donor may have indicated his purpose. But mere purposes of a kind generally beneficial, as of those of benevolence or liberality, without specifying the objects who are to receive and those objects not being the poor, the court will never attempt to execute."
>
> *Atty. Gen.* v. *Haberdashers Co.*, 1 Myl. & K., 428.
>
> 2 Perry on Trusts, Sec. 712, note.

The "Medical Department," the beneficiary, not being an incorporated institution, or if an incorporated institution, its charter having lapsed, and the use not being a charity, the devise must fail.

If the bequest be considered as one for the company of the Medical Department of Georgetown University, and if that be a charity, when they allowed their charter to lapse there was a resulting trust in favor of the testator heirs-at-law and next of kin.

Easterbrook v. *Tillinghast*, 5 Gray (Mass.), 17.

The bequest is not only indefinite as to its objects and uncertain as to the beneficiary, but the claimants before the Court as the beneficiary are persons claiming to be the successors under a charter which provides for no such use.

> "If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee, although the bequest is to a public charity."
>
> *Stratton* v. *Physio-Med. Inst.*, 148 Mass., 505.

> "Where the gift even to a charitable use is so indefinite as to be incapable of being executed by a judicial decree the gift is void."
>
> *People* v. *Powers*, 147 N. Y., 104.

We insist therefore that the devise in clause (b) of the will for the use of the Literary Department of Georgetown University is void because it was and is teaching religion, and it would be for the benefit or in ease of a religious sect and order, within the

meaning of the prohibition of the Maryland Bill of Rights. And the devise for use of the Medical Department is void for uncertainty as to the beneficiary, and because it is a devise for the use of an incorporated institution not a charity.

We insist also that the devise for use of the "Literary Department of Georgetown University" is void for uncertainty, and because the "Literary Department," as known to the testator, neither by its teaching nor its practice, can be identified with the corporation chartered in 1844 under the name of "the President and Directors of Georgetown College," and because the testator intended the institution which claimed to be chartered under Act of 1815.

Lapsed Residuary Legacy and Devise.

The devise and bequest in clause (b) of the will, if void being in the residuary clause relating to testator's individual estate, pass to heirs-at-law and next of kin. That is to say, the real estate passes to the heirs-at-law and the personal property to the next of kin.

1 Perry on Trusts, Sec. 160, 160a.

Scope and Effect of 34th Section of Bill of Rights.

Construing the 34th Section of the Bill of Rights, the Supreme Court of Maryland held:

> "That the power to take and hold property by gift, grant, devise or otherwise expressed in the charter of a religious corporation did not extend to relieve it from the provisions of the Bill of Rights."
>
> *Church Extension M. E. Church* v. *Smith*, 56 Md., 563.
>
> *Trustees* v. *Manning*, 19 Atlantic Rep. (Md.), 603.

Much less could a gift for such a purpose to be received and administered by a corporation *ultra vires* its charter escape the knife of the statute.

The purpose of the Act of Congress of 1866 (Sec. 457, R. S. Dist. Col.), in keeping of force this Section of the Bill of Rights, is manifest.

It is the expression of a public policy, a remedial statute intended to prevent the diversion of a man's property to religious uses when facing an approaching end and all earthly ties and affections are dwarfed, and the claims of religious associations, however delicately asserted, assume an overpowering influence over the mind.

It is a remedial statute, and as such must be construed liberally to effect the object aimed at and to prevent the evils (from a public policy standpoint) which the statute was intended to cure.

> "Thus the Mortmain Act, which prohibits the disposition of lands to a charity by other means

than by a deed executed a year before the donor's death, was open to the construction that it applied only to lands which passed by deed, and therefore not to land of copyhold tenure. But as the object of the statute was, manifestly, to include all lands of whatever tenure in its prohibition, it was held to apply to lands conveyed by copyhold tenure.

Endlich on the Interpretation of Statutes, Sec. 111; *Doe* v. *Waterton*, 3 B. & A., 151.

The history of the statutes similar to the 34th Section of the Maryland Bill of Rights, and the liberal construction uniformly given them to effect the object aimed at, is given in

Price v. *Maxwell*, 28 Pa. St. Rep., 33.

The courts go behind corporate charter cloaks, to determine from the facts whether the gift is for the benefit or *in ease* of a religious order, denomination or teacher of religion.

Idem.

Stile v. *Halleck*, 16 Nevada, 373.

Coates v. *Campbell*, 37 Minn., 501.

Cook v. *Industrial School*, 125 Ill., 541.

Louisiana Annual, &c., v. *New Orleans*, 50 La.

Boyer v. *Christian*, 69 Mo., 492.

The stated reading of the Bible in a public school renders it a place of worship within the provision of the Constitution of Wisconsin. The use of the Bible as a text book and the stated reading thereof in the public schools without restriction is sectarian instruction.

State v. *District Board*, 7th L. R. A., 330 (Wis.).

The view taken by the Supreme Court of the District of Columbia as to clause (b) of the Will.

Judge HAGNER in his Opinion (Rec., 87 to 117) took the view:—

(1) That the Act of Congress of 1844 incorporating James Ryder *et al.* under the name of "The President and Directors of Georgetown College," repealed the former charter and the powers granted to the institution by the Acts of Congress of 1815 and 1833, and converted the religious institution into a secular one. To use his language:

> "For as its only legislative charter of 1844 must have *superseded* all antecedent inferior authorizations to the institution, *it became* and still remains the *only law controlling the subject.*" (Rec., 102.)

(2) Taking the view that there was but one institution in existence, and that the corporation, chartered by the Act of 1844, incorporating James Ryder *et al.* under the name of "The Pesident and Directors of Georgetown College," he reached the conclusion that the use of the term "Georgetown University" by the testator was a misnomer intended solely for that institution chartered in 1844. (Rec., 100.)

(3) And taking the view that the restriction in the charter of 1844 that the funds of the college chartered should only be used "for the instruction of youth in the liberal arts and sciences" was a prohi-

V.

Carroll Morgan's Share in His Father's Estate.

CLAUSE (c) OF THE WILL.

The devise and bequest to his trustees named in the will of his share in his father's estate to be held on the uses and trusts as follows:

> (c) To pay and see to the application of the sum of Ten thousand dollars ($10,000.00) to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the Colonial history of Maryland and the territory embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan Fund."

We insist that the above bequest is void for the eight different reasons stated in our assignment of errors numbered VI (*ante*, p. 15-17).

We think that the reasons given by Judge Hagner in his opinion (Rec., 109, 110, 111) for holding this bequest void have not been satisfactorily answered by the Court of Appeals in their opinion (Rec., 136, 137, 138).

We have already adverted to the fact (*ante*, p. 86) that the Court of Appeals, in order to sustain the validity of this clause has placed a totally different meaning upon the term "Liberal Arts and Sciences" in the charter of 1844, from the restricted

meaning which they applied to it in order to sustain clause (b).

The power limited in that charter "for the instruction of youth in the liberal arts and sciences" would certainly not be called into play by having some professor of the college make researches into the colonial history of Maryland. Yet this is the purpose that the claimants seem to contend for. (Rec., 74.)

Nor do we think that the result to be attained as expressed in the opinion of the Court of Appeals makes the bequest a charity within the legal definition of the term. They say (Rec., 137-8):

"But in this case, it is not difficult to perceive that the result of careful research into matters of interesting and important history, and the gathering together the archives and documents relating thereto would be the subject of great public interest, and particularly valuable to the future historians of the country. And that being so there can be no reason for questioning the validity of the bequest upon the ground that there is no charitable utility to be derived from its execution."

But what property right or interest is the public or any class of persons given under the bequest itself, either in the archives to be acquired or in the result of the research? Who is given the right to consult the archives? What class of beneficiaries could come into a court of equity and complain of a breach of the trust?

If it is a gift to Georgetown College for its own benefit, then it is not a charity but a gift to a private

institution which is only authorized to receive and expend funds "for instruction of youth in the liberal arts and sciences" and "for no other purpose."

If this private institution is to receive it in trust, who are the beneficiaries of that trust? Are they the "future historians" to whom the court refers?

We do not think however that this is a gift to the University as the beneficiary at all.

Church Ex. M. E. Church v. *Smith*, 56 Md., 397.

While the sum of $10,000 is to be paid to the University, his named trustees are to see to the application of it for the sole and specific purpose of

> "an endowment for the prosecution of research in the Colonial history of Maryland and the territory embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto."

There is no provision here for the establishment of a library for the benefit of the public, nor provision for the public circulation of the matter collected. At best it is a provision for the establishment of private archives which might or might not be beneficial to the public or to particular individuals according as the custodian should or should not allow access thereto. There is absolutely no beneficiary who could come into court and complain of a diversion of the fund from the specific purpose stated, and the use is not charitable within the meaning of the rule.

Where a gift was to maintain a house for entertaining members travelling to attend meetings of

the Society of Friends, the Supreme Court of Rhode Island (1892) held the gift not a charity and said:

> "If the gift be not a charitable use, the court cannot make it such simply because it sees the testator hoped its effect would be to accomplish a charitable end."
>
> *Kelly* v. *Nichols*, 17 & 18 R. I. (1892), 19 L. R., Ann., 413.

> "A bequest to a law library which has no corporate existence but which was established and maintained by fines, etc., to be paid to a committee appointed by the court is a bequest to a mere inanimate thing having no capacity to receive a gift and is void."
>
> *Craig* v. *Lill* (Pa.), 7 Cent. Rep., 659-19 W. N. C., 375.

> "A bequest to a Sunday School to be used in making Christmas presents is not a charity."
>
> *Goodell* v. *Union Ass.*, 29 N. J. Eq., 32.

> "The court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society."
>
> 2 Pomeroys Eq. Jur., Sec. 1019.
>
> *Corporation of Gloucester* v. *Woods*, 3 Hare, 131-136-148.

> "The doctrine of *cy pres* does not apply to a bequest which is not a charitable use."
>
> *Kelly* v. *Nichols*, R. I. (1892), 19 L. R. Ann., 413.

A gift to a specific object of charity that fails, where there is no general charitable intention, can not be applied *cy pres*, even in those jurisdictions where that doctrine is applicable.

Atty. Genl. v. *Oxford*, 1 Bro. Ch., 444 note.
Anonymous 2 Freem, 261.
Atty. Genl. v. *Whitely*, 11 Ves. Jr., 251.
Cherry v. *Mott*, 1 Myl. & C., 123.
Clark v. *Taylor*, 1 Drew, 642.
Fish v. *Atty. Genl.*, L. R., Eq., 521.
Carter v. *Balfour*, 19 Ala., 814.
Russell v. *Kellett*, 2 Smale & G., 264.
Simmett v. *Herbert*, L. R. 7 Ch., 232.
Re White's Trust, 55 L. J., Ch. N. S., 731.
Lechmere v. *Centler*, 24 L. J., Ch. N. S., 647.

"If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee although the bequest is to a public charity."

Stratton v. *Physio-Med. Inst.*, 148 Mass., 505.

So in the case at bar, even though the money is directed to be paid over to Georgetown University, and if that be considered as a charitable institution (which it is not), still if the purpose to which it is to be applied is not charitable within the meaning of the rule, and that purpose fails for want of a designated beneficiary capable of applying to a court of equity to enforce the trust the bequest must fail.

"To be a valid trust there must be persons who can prove to the court their undoubted right to the uses of the trust, or objects named of a tangible nature which can be assisted; otherwise it could not determine who could complain of a breach of the trust, or enter a decree for its performance."

Cloyne v. *Young,* 2 Ves. Sr., 91.
Robinson v. *Waddelow,* 8 Sim., 134.
Knight v. *Knight,* 3 Beav., 148, 174.
Williams v. *Kershaw,* 5 Clark & F., 111.
Kendall v. *Granger,* 5 Beav., 300.
Nichols v. *Allen,* 130 Mass., 211, 218.
M. E. Church Ex. v. *Smith,* 56 Md., 362.
Grimes v. *Harmon,* 35 Md., 221, 226.
Heiss v. *Murphey,* 40 Wis., 276.
Goddard v. *Pomeroy,* 36 Barb., 548, 555.
Gumble v. *Pfluger,* 62 How. Pr., 118.

This was also the rule laid down by the Supreme Court of the United States in:

Trustees of Phil. Baptist Ass. v. *Hart,* 4 Wheat., 1

The rule has since been reviewed by the Supreme Court of the United States, and modified only to the extent that gifts strictly *to charitable uses are to a certain extent excepted* from its operations.

Ould v. *Washington Hospital,* 95 U. S., 303.

In that case a bequest to trustees for a hospital *to be afterwards chartered* was held good by way of executory devise to charitable uses.

To the same effect were the cases of:

Russell v. *Allen,* 107 U. S., 163.
Jones v. *Habersham,* 107 U. S., 174.

There is nothing, however, in these cases modifying, except for charitable devises, the rule previously laid down, that the bequest fails where there are not designated beneficiaries, capable of coming into

court and complaining should there be a diversion of the fund from the object limited in the bequest.

In the last mentioned case, there was a bequest in trust by name to the "Georgia Historical Society," an incorporated society chartered for the purpose of "collecting, preserving and diffusing information relating to the history of Georgia in particular and American history generally." The bequest was to keep the building as a *public* library and academy of Arts and Sciences, to be kept open *for the use of the public* and a fund was also devised to equip it.

This was sustained as a good charitable devise.

There is a vast difference between that case and the case at bar.

There the trustee was an incorporated society, and the trust was germane to its general purposes. Moreover it was a bequest for public use—a public library and academy—a public charity. While in the case at bar the public have no share in it, and the beneficiaries are not named. The prosecution of research, and the acquisition and preservation of archives relating to the Colonial history of Maryland is all that is provided for.

A bequest was held not a charity and void for uncertainty:

> "For the purchase and distribution of such books as may have a tendency to promote the interest of virtue and religion and happiness of mankind."

2 Perry on Trusts, Sec. 713.

Brown v. *Yeal*, 7 Ves. Jr., 50 note.

Briggs v. *Hartley*, 19 L. J., Ch. N. S., 416.

"It will further be seen that the word 'charity' has obtained a signification in law; and that courts do not uphold or administer trusts for particular purposes which are not charitable within the meaning of the law, nor trusts expressed in general words which do not come within the legal signification of the word charity."

2 Perry on Trusts, Sec. 709.

LAPSED LEGACY FALLS INTO RESIDUARY CLAUSE.

If the bequest of money in clause (c) fails, it being a part of testator's share of his father's estate it falls in to the residuum clause (i) dealing with that estate.

1 Perry on Trusts, Sec. 160, 160 (a).

Clause (d) of the Will.

The bequest to testator's trustees named in the will of

"(d) A sum *not to exceed* five thousand dollars ($5,000) to be applied and expended under the personal supervision of his trustees to the purchase and erection of a chime of bells and either a side altar or memorial window for some one Catholic Church, said church to be in the District and to be designated by his mother by her last will or otherwise" is void,

(1) Because no particular church is named.

(2) Because his mother died without naming any particular church.

(3) Because a gift or devise to a church, if any particular corporation were named, would be a gift or devise for the support, use and benefit of a religious sect, order and denomination and be a devise that was not made more than a calendar month prior to the death of the testator.

(4) That the devise was not of any particular sum, and the amount to be applied as well as the manner of its application and selection of the church was left to the personal discretion of the trustees named in said will, one of whom is dead and the other has resigned, and the power to designate the sum to be used, the church to be benefited and the manner of its application was a personal power which ended with the death and resignation of said trustees as aforesaid.

(1) No particular church was named as the beneficiary, and the testator left it to his mother to designate one.

> "A clause in a will which is in effect a mere authority to a third person to direct how a specified sum shall be disposed of is inoperative and the sum named therein being a void bequest falls into the residue of the estate."
>
> *Bristol* v. *Bristol*, 53 Conn., 242.

(2) But in any event the mother having died without exercising the power the bequest lapsed.

> *Gambel* v. *Trippe*, 75 Md., 252.
>
> *Fontain* v. *Ravenel*, 17 How., 382.

(3) This is a gift for improvement of a Catholic Church.

> "The term 'church' imports an organization for religious purposes, and property given to it *eo nomine*, in the absence of any declaration of trust or use, must necessarily imply and intend to be given to promote the purposes for which a church is instituted, the most prominent of which is public worship."
>
> *Baker* v. *Fales*, 16 Mass., 495.

Such a gift to the Catholic Church must necessarily be a gift for the use or benefit of that particular denomination or religious sect, and void under the provision of the bill of rights in force in the District of Columbia.

(4) Because there was no particular sum donated, but the amount to be used and its expenditure were left to the personal supervision of his trustees named, one of whom is dead and the other resigned. The $5,000 was only named as a maximum limit, but the amount to be used was (within that limit) a matter left wholly to the discretion of trustees no longer capable of exercising it. That a real discretion was intended to be vested in the trustee by the testator as to fixing the amount which should go under the contingent bequests made in clauses (d), (e) and (f), and that the words used, "*not to exceed* five thousand dollars" were not intended to mean "five thousand dollars" is shown by the following considerations:

(x) The objects of the gifts in clauses (d) and (e) were left to the caprice or choice of his mother or of the named trustees, and the cost of the things stated would necessarily depend upon how that choice was exercised. And as the gift in clause (f) was contingent on a failure of clauses (d) and (e), testator used in that clause the same language fixing an uncertain amount to be determined on the same discretion.

(y) On the other hand the gift of $10,000 in clause (c) and $5,000 in clause (h) were of fixed and definite sums.

"If the sum to be given to a charitable use be left blank or uncertain the trust will fail. As where £6,000 was given for a hospital to increase till it amount to ..... for supporting ..... boys."

2 Perry on Trusts, Sec. 714.

Ewen v. *Bannerman*, 2 Dow & Ct., 74.

Flint v. *Warren*, 15 Sim., 626.

Second Cong. Society v. *F. C. Soc.*, 14 N. H., 315.

Russell v. *Jackson*, 10 Hare., 204.

Coxe v. *Bassett*, 3 Ves., 155.

Hartshorn v. *Nichols*, 26 Beav., 58.

Where a bequest was to testator's mother to use whatever portion she pleases, on condition that she make a will leaving whatever portion she does not use to certain charitable objects, it was held that the trust in favor of the charitable objects failed for uncertainty of amount donated.

Mills v. *Newberry*, 112 Ill., 123.

"To constitute a valid trust, undoubtedly three circumstances must concur; sufficient words to raise it, a definite subject and a certain or ascertained object."

Sir Wm. Grant in Craigs v. *Colman*, 9 Ves., 323.

"Charitable trusts are further distinguished from ordinary trusts by the uncertainty of their beneficiaries. Such uncertainty does not cause a charitable trust to fail."

5 A. & E. Ency. Law, p. 905.

"This statement is to be understood, howere, as referring to the uncertainty of the in-

dividuals to which the bequest is made, and not to the certanty of a class of individuals from which the beneficiaries shall come."

Idem., p. 905.

VII.

Clause (e) of the Will.

"(e) And if his mother fails so to do he directs his trustees to donate the same to some Catholic Church, giving a preference if there be one built by the Jesuits."

This clause is void for each of the reasons given under the preceding paragraph, and for this additional one:

(1) The trustees named having no longer the power to execute the personal discretion vested in them, one being dead and the other resigned, the trust is not capable of being executed.

This is the precise question settled in:

Fontain v. *Ravenel*, 17 How., 369-382.

And to the same effect:

Gamble v. *Trippe*, 75 Md., 252.

Where under a will the trustees were to select the beneficiaries from the charitable institutions of two states, the court said:

"If they refuse to execute it or the power remains unexecuted it is not apparent how the court could make a selection. * * * Neither could the court select individuals to perform a duty devolving upon the trustees, who are seleced no doubt by reason of personal

confidence in their judgment and their capacity for the task imposed."

VIII.

Clause (f) of the Will.

"(f) And if the foregoing gift be void he directs said sum not exceeding $5,000 shall be equally divided between St. Vincents and St. Joseph's Catholic Orphan Asylums in the City of Washington."

(1) This clause is void because no definite amount is named. It was only to be such an amount as his trustees named exercising the discretion reposed in them personally might have expended, for a chime of bells, side altar and memorial window of an undesignated church.

The authorities cited under the two preceding paragraphs are equally applicable to this.

Pritchard v. *Thompson*, 95 N. Y., 76.

Testator's persistence in the attempt to make said precedent bequests "d" and "e" (although from the language used by him in clause "f" he appears to have been advised that said bequests covered by clauses "d" and "e" might be void) makes it the evident intent of testator that a choice of an object should be made by his mother or by his trustees under clauses "d" and "e", and that a sum (within the aforesaid maximum limit) sufficient in their discretion for the object selected should be set apart by his trustees for that purpose, and that a test case should be made of the right to so apply it, and only after a failure to achieve that object, is the sum so set apart, bequeathed by said clause "f".

On the other hand the $10,000, bequest in clause "e" and $5,000 bequest in clause "h" were of definite sums.

We do not think Judge Hagner's reasoning in his opinion (Rec., 109) against the validity of clause "f" has been successfully met by the reasons assigned by the Court of Appeals (Rec., 139) for reaching the opposite view. They say:

> "The words 'not exceeding' would seem to have been used without any special intention of qualifying or limiting the sum bequeathed and directed to be equally divided; these latter terms, we think, plainly indicating the intention of the testator to give the half of $5,000 to each of the two institutions."

But suppose the trustees had selected the side altar or memorial window for some Catholic Church designated by his mother as provided for by clause "d", and suppose the cost was $3,000 or $4,000 for the one or other choice made by the trustees. And suppose before the money was expended, this clause "d" had been attacked as it has been done by this bill. The court would have been bound to have held the clause void as a gift or bequest within the prohibition of the bill of rights, being a gift to or for the benefit of a sect or denomination. In such a case what amount would pass under clause "f"? Did not the testator by using the words in clause "f", "*said* sum *not exceeding* $5,000" expressly refer back to the uncertain sum stated in clause "d", which he left to the discretion of his named trustees and his mother to make certain? And if they had made it certain, and the clause had been declared void for any reason as the testator feared it might,

did he not expressly state that it was *said* sum so to be ascertained which was *to be equally divided* between the two institutions named in clause "f"?

In what way the use of "*equally divided*" can add certainty to the amount it is difficult to understand.

The intention of the testator is of course the criterion, but his intention must be inferred from the language he uses in the clause and elsewhere in the will, and as he states definite amounts in clauses "c" and "h" in making similar bequests, we must conclude that he used the indefinite expression "said sum not to exceed $5,000," in clause "f," because he intended that the definite sum shall be fixed by the choice he left his trustees and his mother to make in the antecedent clause to which the word "said" relates. And since they cannot now fix that sum the uncertainty voids clause "f" as well as it admittedly voided clauses "d" and "e."

> "Whenever a power is of a kind that indicates a personal confidence it must *prima facie* be understood to be confined to the individual to whom it is given, and will not except by express words pass to others to whom by legal transmission the same character may belong."
>
> *Cole* v. *Wade*, 16 Ves. Jr., 27.
> *Alexander* v. *Alexander*, 2 Ves. Sr., 643.
> *Powles* v. *Jordan*, 62 Md., 503.
> *Gamble* v. *Trippe*, Ind., 15 L. R. Ann., 235.
> *Atty. Gen'l* v. *Berryman*, 1 Dickens, 168.
> *Fontain* v. *Ravenel*, 17 How., 369-382.

(2) There are no asylums in the City of Washington having the corporate names used in the will.

What makes it clear however that the testator intended the corporations chartered as "St. Vincent's Orphan Asylum" and "The Trustees of St. Joseph's Male Orphan Asylum" are the descriptive words used by the testator "*Catholic* Orphan Asylums."

It is in evidence that these two institutions are operated under the auspices of the Catholic Church. (Rec., 43, 44 and 39.)

Their charters are in evidence and show that they organized as *private* charitable and educational institutions. The documentary evidence (Rec., 43 to 45) shows that St. Joseph's was organized by the Catholic clergy, and in charge of the Sisters of the Holy Cross.

If the term "church" used in a bequest imports an organization for religious purposes (*Baker* v. *Fales*, 16 Mass., 495) the term "Catholic Orphan Asylums," in a bequest to certain schools organized as private charities by the Catholics, certainly imports a gift for the use and benefit of that denomination, and brings these gifts within the scope of the Bill of Rights, the gifts not having been made thirty days prior to testator's death.

If for either of the above two reasons the bequests lapse, they fall into the residuary clause.

1 Perry on Trusts, Sec. 160 (a).

IX.

Clause (g) of the Will.

The bequest to testator's trustees:

> "(g) To pay and see to the application of:
> "A sufficient sum not to exceed three thousand dollars, the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University, otherwise in some medical college in the District to be known as the E. Carroll Morgan Scholarship," with proviso as to qualification of the applicant, is void:
>
> (1) Because no definite sum was donated and the amount was left to the personal discretion of trustees named who by reason of death and resignation can no longer exercise that discretion.
>
> (2) Because the discretion to select the particular medical college was reposed in the trustees named and expired with the death of one and resignation of the other.

See authorities cited under preceding paragraphs.

In this clause we have the use of the expression "A sufficient sum not exceeding $3,000" in connection with a discretion vested in his trustees to select an uncertain object, which might require a different sum according to the choice made. There are no qualifying words like "*equally divided*" which the Court of Appeals held to be the saving words in clause "1." And yet without giving any similar reason for it they take the contrary view to that taken by Judge Hagner, and they base it upon the view (Rec., 140), that while the amount is uncer-

tain that the substituted trustees can under the direction of the court make the selection of the medical college, and when the selection is made that this will fix the object, and render definite the sum which will have to be set aside to create the income to maintain the scholarship. We respectfully submit that this view is directly opposed to that expressed by this court in *Fontain* v. *Ravenel,* 17 How., 369.

> A bequest to such corporations, having power to receive and hold funds upon permanent trusts for charitable or educational uses, as the trustees might select, and in such sums as they should determine was held bad for uncertainty and because there were no certain beneficiaries who could complain, there was no enforcible trust.
>
> *Pritchard* v. *Thompson,* 95 N. Y., 76.

> (3) Because the gift was not really to any college, but really to testator's trustees to apply the income for the professional education in medicine of any person who might chance to stand the most excellent in a competitive examination (see proviso to clause h). Neither in the character of the education or the designation of the recipient to be benefited does it fall within the designation of a charity.

It is merely a bequest falling within the class of gifts designated benevolence and liberality.

> "If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee, although the bequest is to a public charity."
>
> *Stratton* v. *Physio-Med. Inst.,* 148 Mass., 505.

The beneficiaries are indefinite, uncertain, not chartered, and not limited to any charitable objects.

"The court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society."

2 Pomeroy Eq. Jur., Sec. 1019 notes.

Corporation of Gloucester v. *Wood*, 3 Hare, 131, 136, 148.

"A bequest to a Sunday school to be used in making Christmas presents is not a charity."

Goodsell v. *Union Ass.*, 29 N. J. Eq., 32.

"The principle on which the decision in *Norris* v. *Thompson's Exor.*, 4 C. C. Gr., 308, s. c. on appeal, 5 C. E. Gr., 489, rests, is, that where a trust is in such general terms that the fund may be applied at the discretion of the trustees, not only to purposes strictly charitable according to the settled meaning of the term, but also to other indefinite purposes of benevolence or liberality, it is void for the reason that the court cannot direct the application of any part to charitable uses against the terms of the trust giving an option to the trustees to apply it wholly to other purposes of a different kind."

Decamp v. *Dobbins*, 27 N. J. Eq., 46.

Mr. Justice Gray, delivering the opinion of the Supreme Court of the United States in *Jones* v. *Habersham* (107 U. S., p. 174), said:

"It is only when a gift might be applied to benevolent purposes which are not charitable in that sense that the gift fails," citing:

Saltonstall v. *Sanders*, 11 Allen (Mass.), 446.

Suter v. *Hilliard*, 132 Mass., 412.

Decamp v. *Dobbins*, 29 N. J. Eq., 36.
Adge v. *Smith*, 44 Conn., 60.
In re Jarmon's Est., 8 Ch. Div., 584.

Lord BROUGHAM states the distinction thus:

"If the intention be charity, the court will execute it however vaguely the donor may have indicated his purpose, but mere purposes of a kind generally beneficial, as of those of benevolence or liberality without specifying the objects, who are to receive, and these objects not being the poor, the court will never attempt to execute."

Atty. Genl. v. *Haberdashers Co.*, 1 Myl. & K., 428.

2 Perry on Trusts, Sec. 712 note.

"A trust to keep testator's house open for the entertainment of ministers and others of his faith, traveling in the service of truth, being merely for hospitality, although the purpose may have been to aid in spreading the truth, is not charitable."

Kelly v. *Nichols*, (R. I. 1892), (17 and 18 R. I.), 19 L. R. Ann., 413.

Where a fund was left in hands of testator's executors to apply "to the personal relief of the poor, *or otherwise in the service of the truth*," the bequest was held void. On this point the court said:

"While this implies that some portion of the fund may be used for the personal relief of the poor, it by no means limits or directs the application to such use, and the phrase 'or otherwise in the service of truth,' places a use for the poor at most only in the alternative with the other uses which the testator had already pointed out in his will."

Idem.

If this is a lapsed legacy, it being of money it falls into the residuary clause (i) of the will.

"If the subject-matter of the bequest that fails is personal estate, the residuary legatee will take all that results, for a general residuary bequest is always held to carry every interest, whether undisposed of in the will, or undisposed of in any event."

1 Perry on Trusts, Sec. (a), citing:

Dawson v. *Clarke*, 15 Ves., 417.

Brown v. *Higgs*, 4 Ves., 708; 8 Ves., 570.

Shanley v. *Baker*, 4 Ves., 732.

O'Keys v. *Heath*, 1 Ves., 141.

Cambridge v. *Rous*, 8 Ves., 25.

Cooke v. *Stationers Co.*, 3 M. & K., 264.

Bland v. *Bland*, 2 Z. & W., 406.

Jones v. *Mitchell*, 1 S. & S., 298.

Leake v. *Robinson*, 2 Mer., 392, etc., etc.

X.

Clause (h) of the Will.

The bequest to testator's trustees:

(h) To pay and see to the application of:

The sum of five thousand ($5,000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as said testator might thereafter verbally indicate to his trustees, or if he failed to so indicate, then as his trustees with the advice of proper persons might decide to the maintenance of a scientific department, or the foundation and the appli-

cation of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of his will (g and h above) shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown," is void for the following reasons:

(1) Because the gift and devise is uncertain as to its object and too indefinite, and depends upon proof of verbal directions given or to be given outside of the will.

(2) Because it cannot now be determined whether said testator indicated his wishes in the premises verbally to the said William J. Stephenson, the deceased trustee, or not; if he did so indicate, such indication then and there superseded the other provisions of the clause, and since such verbal instructions cannot be given effect the whole devise must lapse.

(3) Because the specific application of the gift is not therein determined, but left with trustees, one of whom is now dead, and with other persons who were to be selected and whose competency was to be passed on by said trustee now dead, and the power was one personal to the trustees named in the will and did not pass to the substituted trustees.

(4) Because there is no such corporation as Georgetown University in the District of Columbia, and if Georgetown College is meant, it is a gift or devise for the support, use and benefit of a religious sect, order, denomination and public teacher of the Gospel made within one calendar month prior to the death of the testator.

(1) It is clear that the first provision creating a $5,000 "E. Carroll Morgan fund" or "scholarship" to be applied as said testator might thereafter verbally indicate is void. It does not appear that he did verbally so indicate.

> "Where the income was to be applied according to a statement appended and there was no such statement, the court held it could not presume that the intent was charitable."
>
> *Aston* v. *Wood*, L. B. 6 Eq., 419.
>
> 2 Perry on Trusts, Sec. 705 note.

The alternative use,

> "or if he failed to so indicate, then as his trustees with the advice of proper persons might decide, to the maintenance," etc.,

is likewise void for several reasons.

In the first place the discretion is vested in the trustees in the alternative to apply the income to a scholarship in Georgetown University; the only limitation and description of the beneficiaries being stated as follows:

> "That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia, and at the time or within a year a student in a Catholic or a public school of the District of Columbia, and most excellent in a competitive examination conducted by the faculty of the University of Georgetown."

It is not even probable that such a successful competitor would be an object of charity. He might well be the son of a millionaire. The gift is not to a class, with discretion vested in the trustees to select the candidate needing such bounty. But the use must go to the successful competitor.

This is clearly no charity, but a benevolence or liberality within the meaning of the rule, and under the authorities hereinbefore cited, void.

(3) As the trustees were vested with discretion to use the fund for the above purpose as they, with the advice of proper persons, might decide,

> "or to the maintenance of a scientific department in the Georgetown University."

The failure through illegality of the one alternative voids the whole bequest.

This is the exact point settled by the authorities quoted under paragraph IX of this brief, and approved by the Supreme Court of the United States in *Jones* v. *Habersham*, the case quoted.

This alternative provision also voids the bequest for the following reasons:

It was not a bequest to either use definitely. The discretion to apply it to the one purpose or the other was a power and discretion vested in his trustees named personally, to be exercised in conjunction with unnamed persons to be personally selected by them.

Where under the will the trustees were to select the beneficiaries from the charitable institutions of two states, the court said:

> "If they refuse to execute it, or the power remains unexecuted it is not apparent how the court would make the selection. * * * Neither could the court select individuals to perform a duty devolving upon the trustees, who are selected no doubt by reason of personal confidence in their capacity for the trust imposed."
>
> *Pritchard* v. *Thompson*, 95 N. Y., 76.

"Where a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree the gift is void."

People v. *Powers*, 147 N. Y., 104.

"The death of trustees who are given by will power to select the beneficiary of a charitable bequest from several uncertain classes will defeat the bequest if it is to be considered valid in the first instance."

Gambel v. *Trippe*, 75 Md., 252.

Powles v. *Jordan*, 62 Md., 503.

Cole v. *Wade*, 16 Ves. Jr., 27.

Atty. Genl. v. *Berryman*, 1 Dickens, 168.

Alexander v. *Alexander*, 2 Ves. Sr., 643.

In the Maryland case:

"The bequest was to trustees to pay over to some Presbyterian institution in Baltimore as they may determine for charitable and religious purposes."

Gambel v. *Trippe*, 75 Md., 252.

"A clause in a will which in effect is a mere authority to a third person to direct how a specified sum shall be disposed of is inoperative and the sum named therein being a void trust falls into the residue of the estate."

Bristol v. *Bristol*, 53 Conn., 242.

In *Fontain* v. *Ravenel*, 17 How., 369, the testator by the residuary clause gave his executors power to select the beneficiaries of the residuum from a certain class of charitable objects. They died without making the selection. It was held that the bequest lapsed.

In that case Mr. Justice McLean, delivering the opinion of the court, said:

The testator was unwilling to give this discretion to select the objects of his bounty except to his executors. He relied on their discrimination, their judgment, their integrity and fitness, to carry out so delicate and important a power. He made no provision for a failure in this respect, by his executors, or the survivor of them, nor for the contingency of their deaths before Mrs. Koehne's decease. They died before they had the power to appoint, and now what remains of this bequest on which a court of chancery can act?"

Fontain v. *Ravenel*, 17 How., 369.

Again he said:

"Had the contingency of the death of Mrs. Koehne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivor of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country."

Idem.

It was further held that the prerogative power of the King, *parens patrie*, to apply such bequests to similar charities, *cy pres*, does not exist in the chancery courts of this country.

Idem.

If the bequests of money in clause (h) fail, they fall into the residuum.

1 Perry on Trusts, Sec. 160 (a).

The invalidity of clause (h) has been held by both of the lower courts.

XI.

Clause (i) of the Will.

"(i) And lastly as to all the rest and residue of his aforesaid share of his father's estate his trustees, their heirs and assigns shall hold the same for the benefit of his aforesaid sisters Eleanora and Minnie upon the same limitations, conditions, remainders and powers and in the same manner as the trustees under his father's will then hold, retain and possess the 'remainder' and bulk of the respective shares of his said two sisters."

This clause has been construed to be valid by the decree of this Court of Equity, cause No. 18045, which is in evidence and by which decree all parties hereto are bound, having been parties to same.

Under the will of said James E. Morgan as construed by this Honorable Court of Equity, cause No. 18045, the decree being in evidence in this cause:

The trustees under said will of James E. Morgan, hold, retain and possess the remainder and bulk of the share of said Eleanora Speer in trust to hold and invest, and the rents, issues, income and profits thereof to pay to said Eleanora Speer during her life, and on the death of said Eleanora Speer to pay and give in absolute estate by such conveyance or other instrument as may be necessary to her issue the whole of said share, principal and interest, or if said Eleanora Speer shall die without issue living at her death, then to pay and give as aforesaid such share to such person or uses as said Eleanora Speer so dying without issue living at her death shall by her last will and testament indicate or provide."

And under said will as construed by the Supreme Court of the District, in said cause No. 18045:

> The trustees under said will of James E. Morgan hold, retain and possess the remainder and bulk of the share of said Minnie Mosher in trust to hold and invest and the rents, issues, income and profits thereof to pay to said Minnie Mosher during her life, and on the death of said Minnie Mosher to pay and give in absolute estate by such conveyance or other instrument as may be necessary to her issue the whole of said share, principal and interest, or if said Minnie Mosher shall die without issue living at her death, then to pay and give as aforesaid such share to such person or uses as said Minnie Mosher so dying without issue living at her death shall by her last will and testament indicate or provide.

See decree in evidence (Rec., 80).

As has already been seen this clause is the residuary clause for all testator's share coming from his father's estate.

And if the bequests in clauses (c), (d), (e), (f), (g) and (h) have lapsed, they being all gifts of personal property fall into the residuum, and go to the beneficiaries of the residuary clause.

1 Perry on Trusts, Sec. 160a.

On the other hand the devise and bequest in clause (b) of testator's individual estate, real and personal, and being of the residuum of that estate, if the bequest fails goes to testator's heirs and next of kin, according as it is real estate or personal property.

1 Perry on Trusts, Secs. 160, 160a.

XII.

The prayers of the bill, not only call for a construction of the will, but pray for an accounting from the trustees for income, &c. There will be no difficulty as to the last when the proper legal beneficiaries of the several clauses in question have been determined, and a direction for accounting has been made at the foot of the decree made by Judge Hagner.

Respectfully submitted.

MARION ERWIN,
Of Counsel for Complainant.

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Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 153.

ELEANORA D. SPEER ET AL., APPELLANTS,

vs.

MICHAEL J. COLBERT, TRUSTEE, ET AL.

BRIEF FOR APPELLANT, MRS. ELEANORA D. SPEER.

J. R. LAMAR,
Counsel for said Appellant.

(19,587.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 153.

ELEANORA D. SPEER, IN HER OWN BEHALF AND BY EMORY SPEER, HER HUSBAND AND NEXT FRIEND; JAMES MOSHER, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, AND ANNA MOSHER, APPELLANTS,

vs.

MICHAEL J. COLBERT, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF J. R. LAMAR FOR APPELLANT, MRS. ELEANORA D. SPEER.

STATEMENT OF FACTS.

This was a bill filed by Mrs. Eleanora D. Speer in her own behalf and by Emory Speer, her husband and next friend, to obtain a construction of the will of Dr. E. C. Morgan, of whom she was one of the heirs-at-law and one of the residuary lega-

tees. The will was executed April 22, 1891, and Dr. Morgan died May 5, 1891.

Inasmuch as his death occurred within thirty days of the execution of the will, its provisions came within the terms of the Maryland Bill of Rights, which is of force in the District of Columbia, and by which (sec. 457, Rev. Stat. Dist. of Col.) it is declared that

> "Every * * * devise of goods or chattels to or
> "for the support, use or benefit of any minister, public
> "teacher, or preacher of the Gospel as such, or any
> "religious sect, order or denomination, without leave
> "of the legislature,"

is void "unless made at least one calendar month before the death of the testator."

The opinion of Justice Hagner, of the Supreme Court, and of Chief Justice Alvey, in the Court of Appeals, state the facts of the case very fully, and as the rules of court require "a concise abstract or statement of the case, presenting succinctly the questions involved," we shall endeavor to comply with this requirement for brevity.

The testator's estate consisted of what he had inherited from his father and what he had himself accumulated. The portion made by himself he left to his two sisters, Mrs. Speer and Mrs. Mosher, for life, with remainder to their children. If both the sisters died leaving no issue, then with remainder over

> "to Georgetown University in the District of Columbia,
> "to be an endowment in equal shares of the Literary
> "and Medical departments thereof."

This bequest was attacked as invalid on the ground that Georgetown University was, under the evidence, a teacher of religion, and on the further ground that, under the evidence, a gift to Georgetown University was a gift to the Society of Jesus, a religious order, and void because the will was made within thirty days of the testator's death.

The evidence on this subject is contained in the testimony of Father Daugherty, President, the catalogues (which, by consent, are made a part of the record and transmitted as such to this court—top p. 121, s. p. 234, top p. 124), together with the text books taught in Georgetown University, from which it appears that the course of study at Georgetown is that "generally pursued in the colleges of the Society of Jesus" (s. p. 62), and includes

> "Doctrinal Exposition of Religion; Catechism; Catechism of the Catholic Religion; Christian Doctrine; Handbook of Christian Religion; Chronological Succession of the Popes; On Faith; On the Apostles' Creed; Commandments; On the Means of Grace; On the Sacrament; On the Real Presence; Confession; Indulgence; On the Angelical Salutation."
>
> "Non-Catholics (s. p. 62) are not required to take the Catechism, but all Catholic students are required to approach the Sacrament at least once a month * * * all boarders are required to be present at the public exercises of religion, which are held in the College Chapel, and these exercises are those of the Catholic Church."
>
> "The object of the Society of Jesus is to get a little religion into men (s. p. 69) and the object and aim of the college, as all other colleges, is to teach men a certain amount of human knowledge; and also when we have the opportunity, of conveying the views we hold, and by our discipline and example, urge them on in their spiritual life—in other words, to save their souls."

The Board of Directors and professors are selected by the Superior of the Province. The Board, including the President and Directors, are always Jesuits. They are appointed and removed by the Superior of the Province.

After the suppression of the Society of Jesus by the Bull of Pope Clement XIV in 1773, the order was known as the "Corporation of Roman Catholic Clergymen in America."

By that name it directed the sale of land in 1789 for the purpose of establishing an Academy at Georgetown. Students were first received in 1791, and

> "upon the reorganization of the Society of Jesus in "Maryland in 1805 Georgetown College, as it had "already begun to be called, was transferred to the "Fathers of that Society under whose control and di- "rection the University still remains." (Catalogue 1898–'9, p. 10; Catalogue 1900–'1, p. 17.)

This academy or unincorporated college having no authority to issue diplomas, Congress, in 1815 (6 Stat. at Large, 152), authorized the President and Directors of the College to grant degrees in the faculties, arts, sciences, and other professions to which persons are usually admitted in other colleges or universities of the United States, and in 1833 Pope Gregory XVI signed a decree reciting that "The College of the said Society situated in Georgetown, in North America, having been erected into a university and in all colleges of that Society where courses of philosophy and theology are adopted, great benefit accrued to religion," be therefore conferred the faculty of granting such degrees to the College of the City of Georgetown *of the Society of Jesus.*

In 1844 Congress incorporated the "President and Directors of Georgetown College," and the bill recites that certain named defendants claiming to be the successors of those named in the act of 1844 were asserting a claim to the bequest to Georgetown University under Dr. Morgan's will. The bill denied that the gift was to them or they were the successors in fact.

These individuals answered, claiming the benefit of the remainder under the will of Dr. Morgan for the corporation known as the "President and Directors of Georgetown College." The complainants insisted that the succession had been broken, and that the named defendants under the evidence were not the successors, and that the corporation had been dissolved by the death of all of its members.

The corporation adopted by-laws in 1844 (Record, 49; s. p. 95) providing that "the body corporate shall have power to fill any vacancies," and from 1844 to 1875 the minutes show that the President and Directors met as a *body corporate* and from time to time filled vacancies in the membership. After 1875 (Record, 57; s. p. 111) there was no meeting of the corporate body, but only of *the Board of Directors*, and the vacancies have been filled, not by the corporate body, but by the Board of Directors. The individuals named as defendants in the bill have all been appointed by the Board of Directors, though neither the charter nor the by-laws permit the Board to fill vacancies. As stated above, it also appears that these vacancies were really filled by the Superior of the Province.

The Court of Appeals, however, held (Record, 133) that the bequests went to the President and Directors of Georgetown College under the act of 1844.

All of the other issues relate to questions of law independent of questions of fact.

Understanding that the rules do not permit a copy of the assignments *in extenso*, we state in brief the

ASSIGNMENTS OF ERROR.

It is alleged to have been error in the court to hold

(1.) That Dr. Morgan's bequest was to the President and Directors of Georgetown College.

(2.) That there was any President and Directors of Georgetown College capable of taking.

(3.) It is assigned as error that the bequest to the Trustees to "see to the application of $10,000 to Georgetown University, to be held and used as an endowment for the prosecution of research in the Colonial History of Maryland, and obtaining

and preserving archives pertaining thereto" is void (*a*) because the gift was for a benevolence rather than a charity, and as a charity it was void because of the uncertainty of its terms, and (*b*) the failure to designate beneficiaries; because (*c*) it created a perpetuity not for a charity; because (*d*) the Trustees were to see to the application, and to devise a scheme for the management of the funds, and one of the Trustees having died and the other having resigned, it was impossible for the court to administer the trust, and (*e*) it was also alleged that this devise was void, inasmuch as a gift or a trust in favor of Georgetown University was a gift to a religious order.

(4.) The gift of a sum, *not to exceed* $5,000, to be applied and expended under the personal supervision of the Trustees, for the erection of a chime of bells and a memorial window in some Catholic church to be designated by his mother, and if that gift was void, said sum, *not exceeding* $5,000, to be equally divided between St. Vincent's and St. Joseph's Catholic Orphan Asylums, was void—the court's ruling to the contrary was assigned as error because it was a gift to religious orders; because the amount of the gift was uncertain, and because the amount of the gift had to be determined by the Trustees, and one being dead and the other resigned, it was impossible to determine what amount should be given and what amount should be equally divided between the two hospitals.

(5.) The direction to pay and see to the application of a sufficient sum, *not to exceed* $3,000, to maintain a medical scholarship in Georgetown University, or in some medical college in the District, was void for the same reasons. The sum was uncertain; there was no scheme to decide how or by whom the scholars were to be selected—whether by the Trustees or by the Faculty of the College—and there was

no designation of the persons or class to whom the scholarships should be awarded.

(6.) The provision to pay and see to the application of $5,000 to form a fund, known as the "Carroll Morgan Fund or Scholarship," to be applied as the testator might thereafter *verbally* indicate to his trustees, or, if he failed to so indicate, then as his trustees, with the advice of proper persons, might decide, was void for uncertainty, because there was no verbal instructions given and because the trustees had not, with the advice of proper persons, decided whether it should be a scholarship in the scientific or classical department of the University.

BRIEF AND ARGUMENT FOR MRS. E. D. SPEER, COMPLAINANT IN THE ORIGINAL BILL.

Teaching, Including Religious Instruction, the Main Purpose of the Society of Jesus.

It not only appears from the record and the testimony of Father Daugherty, but it is a matter of common knowledge, of which the court will take judicial cognizance, that while Jesuits are both teachers and preachers, teaching is the principal object of the order. This teaching is accomplished not only through the instrumentality of the individual brother, but mainly through a community of brothers having their local Houses or Colleges. These Colleges correspond to the Monasteries and Abbeys of other orders. The Franciscans and Dominicans and many of the other Catholic orders live a life of seclusion, removed from society, in Monasteries, Abbeys, and Convents. The Jesuits, on the contrary, make habitual intercourse with society a prime duty, disregard all differences of dress, and engage in mission work and teaching in their colleges.

These facts are to be found in standard works like Bartoli's History of St. Ignatius, where it is stated that "all the establishments of the company are composed either of novitiates, *Colleges*, or professed houses" (38).

The attention of the court is also called to 13 Encyclopedia Britannica, 649, from which it appears that Julius II dispensed the General from the vow of poverty, and the colleges were allowed to hold property (649).

> "The oldest college of the Society was founded in 1552 by King John III of Portugal at Coimbra, and when Loyola died in 1556 the Society had * * * twelve provinces with more than one hundred *Colleges* and houses." (653.)

The course of study at Georgetown is that generally pursued in the colleges under the Society of Jesus (s. p. 62), and includes Doctrinal Exposition of Religion, Catechism, Catechism of the Catholic Religion, Christian Doctrine, Handbook of Christian Religion, Chronological Succession of the Popes, On Faith, On the Apostles' Creed, Commandments, On the Means of Grace, On the Sacraments, On the Real Presence, Confession, Indulgence, On the Angelical Salutation.

> "Non-Catholics (s. p. 62) are not required to take the Catechism, but all Catholic students are expected to approach the Sacrament at least once a month. * * * All boarders are required to be present at the public exercises of religion, which are held in the college chapel, and these exercises are those of the Catholic Church. There was formerly a Theological department, but it has been transferred to Whitemarsh, and there is now no course of theology in Georgetown, but it claims the right to confer honorary degrees in theology (s. p. 65) and from 1817 to 1899 conferred twenty-seven degrees of D. D.
>
> "The object of the Society of Jesus is to get a little religion into men (69), and the object and aim of the college, as all other colleges, is to teach men a certain amount of human knowledge; and also, when we

have the opportunity, of *conveying the views we hold*, and by our discipline and example, urge them on in their spiritual life—in other words, *to save their souls*." (71.)

GIFTS TO THE ORDER.

From these extracts from the testimony of Father Daugherty, its President, it appears not only that students are required to attend religious service of the Catholic Church in the college chapel, and they are given religious instruction in the tenets of the Catholic religion, with a view of *saving their souls*, but it also distinctly and positively appears that the college is not merely under the auspices and influence of the Society of Jesus, but that the Board of Directors and the professors are selected by the Superior of the Province. There is no recommendation or advice, but positive and absolute control.

* * * "The Board, including the President and the Directors, are always Jesuits. When the Superior finds some man, through sickness, or otherwise, must leave, he sends some other man to take his place. Then the Directors elect that man into the position on the Board (150). The position of President and Directors, between ourselves, does not mean so much as the Jesuits are concerned. It is only a disagreeable duty, to have to attend the meetings and to have to go through the business and such things as that. But we have to do it in order to retain our legal existence. So far as the Jesuits are concerned, it does not amount to anything, whether one is a part of the Board of Directors, or not, except as a legal part of it. We carry that out in order to conform to the law, and in order to attend to business as we are doing now." (150–151.)

After reading the very frank testimony of the President, it would require an immense amount of technicality to avoid the conclusion that Georgetown, whether called a university

or a college, is as purely a college or chapter of the order as would be the congregation of a church, though for the purpose of holding property it had a board of trustees incorporated for the purpose of having a legal entity to hold title to the building and some one other than the large membership by and with whom contracts could be made. The secular charter may be intended for secular purposes, but the secular holder is a mere trustee for the religious beneficiaries.

But this is not an open question under the record. All of the evidence makes it manifest that Georgetown University or Georgetown College is but a chapter of the order. It became such at a time when there was room to discuss whether the order was technically and legally in existence or not, and the President makes very clear the distinction between *actual* and *legal* existence of the order.

In 1773 Pope Clement XIV issued a Bull to suppress the Society in every State of Christendom; but because of certain formalities as to publication the Society never conceded that it had been legally suppressed. During that period, however, it did not retain its old name, and in 1785 it was known in Maryland under the name of "Corporation of Roman Catholic Clergymen in America." Under that name it directed the sale of lands for the purpose of establishing an Academy at Georgetown. Students were received in 1791, and

> "upon the reorganization of the Society of Jesus in "Maryland in 1805, Georgetown College, as it had "already begun to be called, was transferred to the "Fathers of that Society, under whose control and "direction the University still remains."
>
> Catalogue, 1898–'9, p. 10.
> Catalogue, 1900–'1, p. 17.
> Maryland Act of 1805, chap. 118.

Certainly, then, in 1805 Georgetown Academy or Georgetown College was a chapter or college of the Society of Jesus. It had, however, no authority to grant degrees or to issue

diplomas, and, without attempting to incorporate the existing institution, Congress in 1815 (6 Stat. at Large, 152) authorized

> "the President and Directors of the College to grant "degrees in the faculties, arts, sciences and other pro- "fessions, to which persons are usually admitted in "other colleges or universities of the United States."

After the passage of this act of 1815 the institution began to be known as Georgetown University, and Pope Gregory XVI evidently construed this broad authority to grant degrees as erecting the College into a University, for in 1833 he issued a Bull in which it was recited that

> "The *College* of the said *Society* situated in Georgetown in North America has been erected into a University, and that in all colleges of that Society where courses of philosophy and theology are adopted, great benefit accrued to religion, he conferred the faculty of granting such degrees to the *College of the City of Georgetown of the Society of Jesus*."

A gift to this institution would undoubtedly have been a gift to the Society of Jesus, and in his opinion Justice Hagner (s. p. 195) said:

> "Under the conditions then existing, it is clear that benefactions given to the institution as then conducted would have been as fully within the prohibition of the 34th article of the Declaration of Rights as though they had been bequeathed to any of the avowed theological institutions or divinity schools in the country."

Nothing has occurred since then to destroy the character of the institution. It is now under the same power; it is now radiating the same influence. If in 1835 a death-bed gift to it would have been void, because of the law protecting the heir against religious influences, the same result would follow now if the same influence radiates from this

same source. The law would not be defeated of its purpose because that influence worked through the same men organized into a legal entity. The force of gravity is not lessened because of the interposition of some intervening object, and the religious influence of the order is in no wise minimized because it uses a secular instrumentality for perfecting its organization and carrying on its work.

The act of 1844, if it has any effect whatever, crystallized, strengthened, and made permanent that part of the religious organization which had to do with the secular affairs of life, but it did not minimize or lessen the influence which radiated therefrom, nor did it destroy the animating spirit of the order which gave life and vitality to the organization.

Secular Charter Does Not Destroy Religious Order.

Similar questions have been before other courts, which have been called upon to decide whether a *secular* charter prevented a school conducted by a religious denomination from being a *sectarian* institution. The question is most important and far-reaching; for if a charter from the State by its silence can destroy the religious character of the influence which works through the corporate entity, then the provisions of the various constitutions prohibiting grants to *sectarian* institutions can be absolutely nullified and the fundamental law can be easily abrogated.

Such has not been the ruling of the courts which have dealt with this important subject.

It was therefore held in State *vs.* Hallock, 16 Nevada, 373, that a school connected with an orphan asylum controlled exclusively by officers of the asylum who were Sisters of Charity, and in which religious instruction was given to Roman Catholic children, is a *sectarian* institution within the constitutional prohibition against using public funds for sectarian purposes.

See other cases cited in 14 L. R. A., 418.

In Kelly *vs.* Wellborn, 110 Ga., 540, a gift to trustees for building a house for the Methodist Church was held to be void within the meaning of the prohibition against a gift to a religious institution. The trustees might have been irreligious or members of another church, but the court was construing a statute that had a definite purpose; it looked through the shadow to the substance, and held that the gift was not to them, though the title was in them.

In Kerr *vs.* Dougherty, 79 N. Y., 51, the court held that Union Theological Seminary was both a literary and a religious society.

In Kendrick *vs.* Cole, 61 Mo., 527, there was a gift to Archbishop Kendrick. The will was changed and the second gift was to John Kendrick, but the evidence showing that the bequest was for the benefit of the church, it was held that the devise was void because of the provisions prohibiting devises to religious sects.

And the policy of the law and the rules for construing these and similar provisions of the law is strikingly illustrated in Knight's Estate *vs.* Liberal League, — Pa. St., —, (28 Atl., 303). It appeared there that the Pennsylvania law prohibited a devise to religious societies. The League had been chartered for the dissemination of scientific truth by means of music, literature, lecture, and debate. All persons, whether Christians or infidels, were eligible to membership. It opposed all "isms." A debate in favor of Christianity was followed by one against it. Many would claim that the League was "irreligious;" but it did something about religion, and that was enough to bring it within the purview of the law, and the devise was held to be invalid.

> "If in any sense of the word, 'religious,' this Society is a religious organization, and money given for its use is given for a religious use."

Compare that case with this. We have here a mountain of facts compared with a mole-hill there. They met for

debate on Sundays. Here every student was required to attend *religious* services. They opposed all "isms." Here Christian Doctrine, the Creed, the Sacrament, and Theological text books are taught. They taught infidelity. Here the Catechism. There they opposed all religions. Here the testimony of the President is that the object is, in part, to help the students save their souls "and when we have the opportunity *of conveying the views we hold.*"

We confidently insist, therefore, that if this gift had been to the "President and Directors of Georgetown College, incorporated under the act of 1844," it would, in the light of the evidence and of these decisions, have been void.

But the gift was not to the "President and Directors of Georgetown College." On the contrary, it was to "Georgetown University," an institution of the order recognized by the act of 1815 and having from the Pope the power to grant degrees in theology—an institution recognized by Papal Bull as being a "*college of that Society, where (when) courses of philosophy and theology are adopted, great benefit accrued to religion.*"

This was an institution which, under act of 1815, had the right to grant degrees in the arts and any profession and the right to grant the degrees of D. D. or M. D.

Misnomer.

There is a gift to Georgetown University, but the defendants seek to avoid its invalidity by the doctrine of misnomer, but there is absolutely no evidence to show that Dr. Morgan intended anything other than was expressed in his will. On the contrary, it appears that his entire will was dictated by a desire to serve pious uses, and that these pious uses were to be administered by or for the benefit of the Society of Jesus. He gave to a religious institution. It is sought, without evidence that such was his intent, to show that the gift was to a secular institution. There were in the

same city two institutions—one known as "Georgetown University," the other as President and Directors of Georgetown College." There being two persons, each having a distinct name, each dwelling in the same building, it would take very strong and direct evidence to show that the testator meant something other than what he said; for where there is a beneficiary which meets the language of the will the court will give effect to the language used, even if in so doing the law interposes on behalf of the heir.

Suppose this will had been made sixty days before Dr. Morgan's death, and there had been a contest between Georgetown University and the President and Directors of Georgetown College, can it be doubted that in the state of this record Georgetown University would have taken?

Undoubtedly the record shows that the "Corporation of Roman Catholic Clergymen" in 1805 transferred this property "to the Fathers of the Society, by whom the property has since been controlled and directed."

There is nothing to show that the title has ever been transferred by the Fathers of the Society to the newly created organization under the act of 1844, and no careful lawyer would take a deed to the property if signed by the President and Directors of Georgetown College, for the fee is not shown to be in them, but remains where it was put in 1805; and when Dr. Morgan gives more property to Georgetown University he gave it to that organization recognized by the act of 1815 and still holding the title to the land and buildings.

That this argument is supported by the testimony will appear from the evidence of Father Daugherty, who when asked "are the Society of Jesus and Georgetown College two different institutions?" answered:

> "They are two different institutions in this sense, that the Society or a certain portion of them get together and form this corporation. Every house in the Society is independent of every other. They are

like the government of two States. They have a certain number of laws which are in common, but they have other laws which are special to each."

If they are different organizations they are indissolubly connected, all having a common purpose. But if this common purpose is to be disregarded and the situation resolved into its component parts, the evidence shows that there are three manifestations on the College Hill:

First. The Society of Jesus, which is the central organization, animating, dominating, and controlling.

Second. Georgetown University, which is but a continuance of Georgetown Academy, recognized as a distinct institution under the act of 1815 and the Bull of Gregory XVI.

Third. The President and Directors of Georgetown College.

But the three are as closely knit as body, soul, and spirit. A gift to either one is a gift to the other two. But if a distinction is to be made, and the body is to be separated from the spirit, then when either is named, the gift is to that which is named. Had the gift been to the President and Directors of Georgetown College, the evidence was insufficient to show that it was intended to Georgetown University, and, conversely, where the gift is to Georgetown University, there is nothing to show that it was intended for the President and Directors of Georgetown College.

The attention of the court is specially called to a most important fact. The Catalogue was issued the year before Dr. Morgan died. His name appears therein as a professor, and in stating the history and power of the University, no allusion whatever is made to the act of 1844. On the contrary, *that act is conspicuous by its absence.* In stating the history of the organization, the Catalogue recites:

"Georgetown University,
Founded in 1789.
Chartered by Act of Congress, March 1st, 1815.
Empowered by the Holy See
To Grant Degrees in Philosophy and Theology
March 30, 1833."

We take, therefore, not only Dr. Morgan but the institution at its word. The gift was, in terms, to Georgetown University. At the time the gift was made the institution was, in its Catalogue, holding itself out only under the act of 1815 and the Papal Bull, and to say that Dr. Morgan did not intend a gift to this Georgetown University is to make him give to a secular institution when he intended his benefaction to go to the religious institution for pious uses.

Bradfield vs. Roberts.

In this view of the case, Bradfield *vs.* Roberts, 175 U. S., 291, is not involved. But, as Justice Hagner seemed constrained by it and as Chief Justice Alvey followed it, it may not be inappropriate to say that the ruling there made would not sustain these gifts, even if Dr. Morgan had made his bequests in favor of the President and Directors of Georgetown College. That case held that a payment to a hospital conducted by Sisters of Charity was not in violation of the provision in the Constitution of the United States prohibiting Congress from making an establishment of religion. It is difficult to see how the ingenuity of counsel could have invoked that clause in that case, but the provision of the Constitution of the United States preventing the establishment of a religion is nothing like so minute as the prohibition in the Maryland Bill of Rights. The latter not only prevents a gift to a church, but, evidently for the very purpose of leaving no loophole, it prohibits a gift not only to a *sect*, but to an *order* in a sect. And then, for fear that that was not broad enough, it descends into still minuter details and pro-

hibits a gift to a *preacher* of religion. Apparently, for fear that this might be construed to relate to ordained ministers, it goes one step further and prohibits a gift to a *teacher* of religion.

A moment's consideration will show that gifts which would be valid under the Constitution of the United States would be invalid under the Maryland Bill of Rights. Congress from year to year makes payments to *chaplains* in the Army, and to the *Chaplain* of the House of Representatives and of the Senate. But a gift to that same Chaplain would be void under the Maryland Bill of Rights if made within thirty days of the testator's death.

In the Bradfield case the allegation was that the hospital was conducted under the auspices of the Roman Catholic Church. The evidence here is not that Georgetown University or Georgetown College is under the auspices of the Society of Jesus. They are conducted by the Society of Jesus. They are absolutely controlled by the order. The Superior appoints President, Directors, and Professors. He also removes them at pleasure. His suggestions are not advisory, but commands, and inasmuch as the Society is not incorporated by any secular charter, if a gift to one of its colleges is not a gift to the order, then so far as the Maryland Bill of Rights is concerned, it is impossible to give to the order.

The only outward and visible sign of the Society is found in its colleges. The catalogues do not speak of Georgetown University as being under the auspices of the Society, but say that in "1805 the property was transferred to the Fathers of the Society, by whom it has since been *controlled and directed.*"

If Bradfield *vs.* Roberts is to be given the construction put upon it by the defendants, the effect will be to make a perfectly easy way of defeating not only the purpose of the Maryland Bill of Rights, but also to defeat the constitutional provisions of many of the States prohibiting gifts to sec-

tarian institutions. It will upset that line of authorities which recognize that an institution may be both literary and religious.

DEVISE TO HOSPITALS VOID, BEING TO RELIGIOUS ORDER.

What has been said as to the policy of the law and as to the misnomer of the University relates also in part to a devise to hospitals. The names of both hospitals are incorrectly stated; but it is perfectly evident that testator intended to devote his money to pious uses, and that the money should inure to the benefit of the Catholic orders which were maintaining the hospitals. This is manifest, because he first gives the money to establish a side altar in a church, by name. Recognizing that this was in the teeth of the statute, he then gives to *Catholic* hospitals—to hospitals under the control and bearing the names of Catholic orders. Keeping in mind the policy of the law, and that each time the testator gives to a *Catholic* Church, to a *Catholic* hospital, it is evident that the purpose of the statute will utterly fail if these gifts are sustained. If, instead of the statute prohibiting such gifts, it had provided that all wills were void if made within thirty days, except where there was a devise to a religious order or to a sect, preacher, or teacher of religion, it is evident that these hospitals, as well as the University, under the evidence, could have recovered on the evidence appearing in this record.

DEVISE FOR COLONIAL RESEARCH IS VOID.

> "To Trustees to pay and see to the application of $10,000 to Georgetown University to be used as an endowment for the prosecution and research of Colonial History of Maryland, and preserving archives relating thereto."

1. If it is treated as a direct gift to Georgetown University, it fails for the reasons already given. It was a gift to a religious order.

2. If treated as gift to the President and Directors of Georgetown College, it fails, because the act of 1844, in so many words, prohibited that corporation from employing its funds or income "for any purpose or object other than those expressed in the first section of the act." They were not authorized by that act to do anything except conduct the college, and it is nowhere authorized to act as a trustee in its corporate entity or to conduct such investigations.

3. Whether to the University or to the College, the gift did not create a charity, but a mere benevolence, which cannot be enforced.

4. It is not a charity, because no provision is made determining what class of the public is to receive the benefit of the investigation, nor on what terms the information is to be disseminated or how the archives are to be examined.

5. There are no beneficiaries named or described. There is no person described who could come into court to enforce the trust, and there is no provision that the documents are to be given without compensation.

6. The provision to "see to the application" contemplates that the Trustees should themselves devise a scheme. The death of the one and the resignation of the other makes it impossible for the Trustees to "see to the application," and the gift cannot be effectuated under the *cy pres* power, for it does not exist in the District.

Fontaine *vs.* Ravenel, 17 Howard, 369.

This not being intended as an absolute gift to Georgetown University, but to it in trust, and the trust failing, the property must descend either to the heir or to the residuary legatee.

Stratton *vs.* Medical Inst., 148 Mass., 505.

Maught *vs.* Getzendammer, 65 Md., 727.

The effect of this trust to pay and see to the application of ten thousand dollars to Georgetown University, to be held as an endowment for the prosecution of research in Colonial History, is very carefully considered in the opinion of Justice Hagner, and we cannot do better than quote therefrom. He says:

I do not consider this as a valid devise or bequest to the Georgetown College, within the declared purposes for which alone it was incorporated, as "expressed" in the first section of its charter. Of the ten thousand dollars thus described no portion, under the natural construction of the clause, would be expended in the instruction of any youth in the "liberal arts and sciences;" nor does it appear that any student connected with the college would ever derive the slightest benefit from any results that might arise from the prosecution of the researches so vaguely referred to. There is nothing to show that any professor or other official of the college could claim any right to interfere in the management of the project; and if any such selection were to be made, the only effect of imposing the prosecution of the proposed research upon the college would be to withdraw some of its teachers from the performance of their regular chartered duties. It is plain the college would have had no right to use its own regular revenues for the work of exploring remote history, or to obtain and preserve what it should acquire; no more could it properly use any benefactions it might receive from other sources for such foreign purposes. The 5th section of the charter declares the corporation shall not employ its funds or income, or any part thereof, for any purpose or object other than those expressed in the first section of the act (not "signified" or "indicated," but named with precision therein). 5 Thompson on Corporations, p. 5772; 2 Kent Com., 229, 240). This precaution is in sympathy with the other safeguards on this point elsewhere expressed by the charter, the law of its being. The proceeds of the lots given by the Government were required to be invested, and the dividends used to aid in the establishment of professorships, &c., and so of the moneys to be received under the authority of the act of 1797, chapter 45, from donations. The college would have no more authority under its charter, to expend the ten thousand dollar fund for re-

searches in colonial history than in researches into the history of any other time or country; and if the heirs-at-law are to be deprived of this part of what was their grandfather's estate in such explorations as are herein indicated, it should only be by the employment of very clear words effecting their disherison, under the plain powers of the charter?

2 Underhill on Wills, p. 903, p. 1386.

The provisions as to the management of the money are in the highest degree uncertain. It is spoken of as an "endowment" and as a "fund," and it is to be "used" and also "held." How much is to be used and how much to be held? In whose name are the funds and property to be held? And how are the archives and papers to be obtained? And what are to be considered as archives "having relation" to the colonial history? There is no power under the charter confided to the officials of the college to assume any such power, so foreign to their duty as instructors of youth in the liberal arts and sciences. I do not believe these delicate and extensive powers are transmissible in their character, and they are therefore not capable of performance by the substituted trustees, nor by the College authorities.

The trust is further invalid, as there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or non-feasance on the part of the College or of the substituted trustees.

The clause imposes a strict duty upon the two trustees named in the bill. To them, *nominatim*, and to their heirs and assigns is given full power to sell the property and reinvest the proceeds *in trust* nevertheless to pay the money to the university and also to see to the application of the money thus paid, which is to be used and held as an endowment. Not only are the trustees to see to the investment of the principal of the fund and its reinvestment, but as they are effectively to see to the application of the money, they necessarily must be also charged with the disbursement of the income, and of part of the principal also, if the archives to be purchased exceed in cost the income. To them also must be committed the direction of the character and extent of the researches and of the archives and papers which are to be obtained; if their duty "to see to the application" of the money is to be effectively performed. It thus

appears the trust committed to them was one to a large extent personal and discretionary, involving the exercise of skill and judgment, confided to them, apparently, as a personal confidence, as is plainly done in other parts of the will; and therefore not of a character to be exercised by the successors in the trust. And yet, both those trustees are no longer connected with the trust, and Messrs. Mosher and Colbert have taken their places as substituted trustees; without any suggestion that they were at all acquainted with the personal wishes of the testator, or would ever have been selected by him to perform his wishes, to so great a degree hidden in his private thoughts.

That the prosecution of historical researches and obtaining and preservation of archives and papers relating thereto, would much more properly be within the function of an historical society, incorporated "for the purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particular and of American history generally," than of a college expressly limited by its charter to the instruction of youth in the liberal arts and sciences, would seem too plain for question; and yet the Supreme Court in 107 U. S., 189, Jones *vs.* Habersham, speaks with very serious doubt on the subject whether the Georgia historical society could exercise similar powers under a will, and it could say nothing stronger in answer to such doubt than to declare: "There is some ground for holding that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents and works of art with other such books and works to be selected by the officers of the society and purchased out of the surplus income, and that the purposes of the trust are, in the words of Mr. Justice Story in Vidal *vs.* Girard, 2 Howard, 189, 'germane to the objects of the incorporation,' and relate to matters which will promote and aid and perfect these objects;" and the court contented itself with saying further that if any doubt remained of the capacity of the historical society to assume the trust, the equity court could appoint other trustees instead of the historical society. If such evident doubts should have beset the court with respect to the words of that devise and the capacity of the beneficiary there explicitly named, to assume a trust so much more germane to the functions of an impor-

tant historical society, which kept a public library for the use of all comers, and whose charter expressed that it "shall be a public act, and shall be construed benignly and favorably for every beneficent purpose therein intended;" it is inconceivable that court could have found the provision before us to be "germane to the objects of the incorporation." Of what value would it be, hereafter, to insert in any charter of a college that its funds and income shall *not* be employed for any purpose or object other than those *expressed* in a particular section referred to, if provisions thus limited may be enlarged at pleasure; so that when thus changed they may read as though the will had commanded the funds *should be used* and employed for *any project* that might appear tempting or profitable—whether it shall be the purchase and exploitation of some promising invention; or the fitting out of exploring expeditions to unknown lands; or embarking in any other adventure which it may be incorrectly pretended may promote instruction of students?

In addition to the authorities above cited by the learned judge, the attention of the court is called to the fact that

THE COLONIAL ENDOWMENT FUND IS NOT A CHARITY, BUT RATHER A BENEVOLENCE.

Devises for keeping up a yacht race, base-ball ground, club-house, race-track, or athletics would be invalid, even though they promote health, physical and mental.

2 Underhill, 1197.

The charity must be public. If it is private, it will fail for want of a certain and definite *cestui que trust*, and if it is private it must not involve the rule against perpetuities. Consequently a gift to "keep corn on hand," to "establish a private museum in Shakespeare's house," to "sustain a library supported by the private contributions of its members," or "buying annually a cup for a yacht race," or "to establish a school," where it does not affirmatively appear but that the school might be private, or "to keep the family

homestead in repair for the benefit of the family," are all private, and therefore invalid. A library may be public, if primarily for a limited class of clergymen, provided it is not confined to them but may be used by the public generally.

2 Underhill on Wills, 811, pp. 1198, 1199.

The World's Columbian Exposition at Chicago was not a charitable trust, although intended to effectuate a public enterprise largely of an educational nature.

2 Underhill, 1197; 50 Fed., 654; 65 Fed., 630.

Gifts of money to "keep clock in repair and house open for visitors" is purely private and personal. It seeks to create a perpetuity to insure the care of those charges. It does not run to corporations authorized by charter to receive such gifts.

Kelly *vs.* Nichols, 21 Atlantic, 907 (bot.).

Whenever a bequest may be applied to other than charitable uses, the bequest is invalid. A little charity cannot preserve the entire bequest.

Ibid., 909.

The court cannot resort to the *cy pres* doctrine to carry out the charitable intention of testator, since such doctrine can be resorted to only where it appears that the bequest is a charitable one.

Mason *vs.* Perry, 48 Atlantic, 671.

Devises for benevolent purposes are invalid, because benevolence is broader than charity in its legal signification, and where the bequest could be applied to other than strictly charitable purposes, the court will not execute the trust. And where the devise was the employment of funds for purposes of mutual benevolence, the devise is invalid under the common law of Pennsylvania or the statute of 43d Elizabeth. A devise may be made to a Masonic lodge

for corporate purposes, and it would then be a valid bequest, as the testator had the right to bestow his absolute benevolence as he pleases, but giving to said lodge a devise as trustee did not have the effect of changing the purpose of the lodge into a charitable institution; for this latter to be valid, the bequest should be made for purposes which are clearly charitable.

As to the devise for entertainment, in Mason *vs.* Perry, 48 Atl., 677, the court says:

> "The property was given in trust for purposes that are charitable, but if these purposes are joined with words which authorize the trustee to expend some indefinite portion of the fund for a purpose which is not charitable, the trust is void. Otherwise, it would be in the power of an individual to make a perpetuity of the property to any extent by devoting some small portion of the undivided income to some charitable purpose. A little charity cannot preserve the entire bequest. If an ascertainable portion be given upon a valid trust and another portion upon a void trust, the whole fails." (Citing 25 Atlantic, 840.)

The devise was therefore held void, although "entertainment" might include moral, intellectual, or spiritual entertainment, it is not synonymous with charity and the doctrine of *cy pres* will not help the case. The court administers the trust as expressed in the will. If the will includes what is not a charity, the court cannot, by its administration, exclude it, but the whole must fail. The *cy pres* doctrine can only be resorted to when the bequest is a charitable one, but no forced construction will be adopted in order to uphold the gift.

Mason *vs.* Perry, 48 Atlantic, 677.

Devise for Scholarship Void.

There are three bequests in this will, each of which are rendered void by their uncertainty; by the fact that the Trustees' personal discretion is involved, and by the further fact that the death and resignation of the Trustees have made it impossible to determine, in a legal way, the testator's wish.

The requirement

(1) That the executors are to *see to the application* of $10,000 towards the endowment fund for Colonial Research;

(2) That they are to *apply not exceeding* $3,000 to a literary scholarship;

(3) That they are *to apply not exceeding* $5,000 to a medical scholarship;

renders void each of these three devises.

In the case at bar the testator has left the method of appropriating the $10,000 to the Colonial Endowment Fund to be determined by the Trustees. He has also left the amount to be appropriated to the scholarship uncertain and indefinite. It does not appear whether the scholarship was to be invested and the sum given for the payment of tuition fees, or whether it was to include tuition and board, or tuition, board, and clothes, or whether it was to be for tuition, board, clothes, and right to travel. All these classes of scholarships exist, but a sum sufficient for one would be entirely inadequate for another, and where the will is uncertain and the amount out of which the scholarship is to come is not described, except by the phrase "not exceeding $3,000," there is no room for applying the doctrine "that is certain which can be made certain."

But rather we have a case of "multiplying uncertainty by uncertainty, resulting in a product of confusion and indefiniteness." The only persons by whom the certainty could

have been reached are no longer legally in existence. In the District of Columbia, where the doctrine of *cy pres* does not apply, the court will not undertake to clear up the confusion and make that valid which was invalid as it was executed.

A will is a legal expression of a man's wishes as to the disposal of his property after his death; but he must make the will; he cannot appoint an agent for that purpose. Or, if he does, and that agent dies or resigns, the uncertainty cannot be removed by the court unless there is data sufficient on the face of the will.

Here, the Trustees were given a sum not *exceeding $5,000*, to be expended, first, in the purchase of a chime of bells, and either a side altar or memorial window, for some Catholic church, to be designated by his mother, and if that gift be void said sum, not *exceeding* $5,000, is to be applied to the two hospitals.

It does not appear what a chime of bells may cost, nor what the memorial window would cost; and that uncertain sum, not exceeding $5,000, is to be divided between the two hospitals.

The next gift, *not exceeding $5,000*, was to be applied as the testator might verbally direct, or, failing that, as the Trustees, *with the advice of proper persons*, might decide, to the maintenance of a scientific department in Georgetown University.

To give property to an agent to do with it as he pleases is equivalent to a conveyance in fee, but where the gift is to an agent, and it appears that the agent is to act as a trustee, but the amount of the gift or the object of the trust is not definitely stated, the devise fails.

See Maught *vs.* Getzendammer, 65 Maryland, 527.

As to such devises the courts will refuse to act, for to enforce such bequests would in effect be to make a will for the testator.

A court of equity has no such general powers; the United States courts of equity have no such powers. The statute of 43d Elizabeth did confer such a prerogative on the chancellor, but it was not a judicial power, but was conferred upon him as the representative of the King, and was a branch of the King's prerogative as *parens patriæ*, and though it may be exercised in those States, cannot be enforced in the District.

Object to be Selected by Trustee or Amount to be Fixed by Trustee, The Devise is Void.

This will appear from Fontaine *vs.* Ravenel, 17 Howard, 369 (decided after the Girard Will Case). A Pennsylvania testator empowered the executors to distribute his estate among such charitable institutions of South Carolina and Pennsylvania as they might deem most beneficial to mankind.

The court said that the United States courts could not exercise any equity power except those conferred by acts of Congress, and those judicial powers which the old court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States. Powers not judicially exercised by the chancellor by authority of the King's prerogative are not possessed by the circuit court. In that case the trustee died before the life tenant, and the court held that the testator had relied on their discrimination, their judgment, and the fitness to carry out so delicate and important a power. They died before they had the power to appoint, and now what remains of those bequests on which a court of chancery can act? Nothing short of the prerogative powers would seem to reach the case. The court therefore held that if such a power could be exercised in England by the chancellor, it could not be by any court in the United States.

To similar effect is Maught *vs.* Getzendammer, 65 Maryland, 527. The devise there was to B, to use the same for such charitable purposes as in his judgment would best promote the cause of Christ. To create a valid trust, the language should exclude all discretion in the party; the subject-matter must be certain and the object must not be too indefinite.

So in Wheeler *vs.* Smith, 9 Howard, 55.

So in Prettyman *vs.* Baker, 46 Atlantic, 1020, and Nichols *vs.* Allen, 130 Mass., 211; Olliff *vs.* Wells, 130 Mass., 321.

We quote again from Justice Hagner:

"In the event this clause and gift be void, I direct said sum, not exceeding $5,000, shall be equally divided between St. Vincent and St. Joseph's Catholic Orphan Asylums in the city of Washington."

The same difficulty attends this devise; that the sum to be divided is uncertain—"not exceeding $5,000," which means any sum less than that amount. Although the names stated in the clause were incorrect, yet as the asylums meant by the testator are sufficiently evident, the misnomer in the title would not affect the gift; but under the proof, they are within the operation of the 34th article of the Declaration of Rights, for they are undoubtedly so associated with the Roman Catholic Church as to subject the bequest to the operation of the Declaration of Rights, and for that reason are void; as the testator postponed the execution of his will just thirteen days too long.

The testator confessedly distrusted the validity of the entire clause of which this was the last provision; and the suggestion in this bequest shows that he had been warned of the probability that such would be the judgment of a court on the point.

Clause (G). Following the introduction common to this and the previous two clauses, the present reads thus:

"Third. A sufficient sum, not to exceed $3,000, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the District, to be known as the 'E. Carroll Morgan scholarship'" (with a proviso as to the qualifications of the applicants for the place).

Several of the objections already considered to the previous clauses are applicable to this provision.

1st. There is no definite sum named to be applied to furnish the income indicated.

2nd. The trustees named are to pay and see to the application of an indefinite sum to be withdrawn from the residue of the estate, *ex parte paterna*, which is to furnish an income for a scholarship in the study of medicine in some college not named, to be selected by trustees, one of whom is dead, and the other resigned from the trust.

62 Maryland, 499, Powers *vs.* Jordan.
75 do., 252, Gambell *vs.* Trippe.

"Had the legacy been valid in the first instance, it would have lapsed because of the death of the trustee." That the person is to be selected for the scholarship, under this and the following clause, by competitive examination by the faculty of Georgetown University, adds additional uncertainty to the provision. Such examination is not one of the duties of the college officials under the charter; and the applicant least in need of the assistance may obtain the benefit of this provision.

Uncertainty pervades the clause in every feature.

It is well settled that where a gift to what may properly be called a charity is so indefinite as to be incapable of execution by a judicial decree, the representatives of the donor must prevail over the charity.

8 N. Y., 526, Williams *vs.* Williams.

This is especially the case where the gift is a mere benevolence or liberality.

29 New Jersey Equity, 46, Decamp *vs.* Dobbins.
95 New York, 82, Pritchard *vs.* Thompson.

Clause "*h*" is obnoxious to several of the objections made to it by the complainants.

The bequest is to his trustees "*to pay and see to the application* of the sum of five thousand dollars to form a fund known as the E. Carroll Morgan Fund or Scholarship, to be applied as I may hereafter indicate to my trustees, and, if I fail, as my trustees with the advice of proper persons may decide, to the maintenance of a scientific department, or the foundation and application of the income to a scholarship

in the classical department in the University of Georgetown in the District of Columbia."

1. There is nothing to show the testator *ever did indicate to his trustees* in any manner his wishes as to the application of the fund or scholarship to be formed.

In case of failure to do so, his trustees were "to take the advice of proper persons," as to the maintenance of one or other of the scientific departments or scholarship referred to. It is clear the duties thus confided to his trustees were intended to be performed personally by Messrs. Stephenson and Magruder, and not by other persons to be appointed, if at all, after the death and resignation of those persons thus named. Of course the testator never could have contemplated indicating verbally his wishes, to persons whose names he could not even guess at, when he made his will, and who could only come into existence as substituted trustees after the testator's death under the appointments of a court.

These substituted trustees are as completely undescribed by his testator as are "*the proper persons*" upon whose advice he desired Stephenson and Magruder to determine what should be done with the money. Being acquainted with those two he had selected to take charge of his estate, he might be willing to trust to their discretion to select "proper persons"; but what guarantee could he have that other persons totally unknown to him would act judiciously in making wise selections of proper private persons equally unknown to him?

These provisions if they mean anything, under the new state of facts, practically allow the unknown substituted trustees and the unknown "proper persons" to make a will for the testator. In the Tilden Will Case, the testator at least had the advantage of knowing his executor personally; but the court refused to sustain the clauses of a will which was to dispose of large properties in the manner agreeable to the wishes of the executor. It was quite enough that Mr. Bigelow should be allowed to make *his own will*, without making one for Mr. Tilden after he had died.

A clause which is in effect a mere authority to a third party to direct how a specified sum shall be disposed of is inoperative, and the sum named therein being a void bequest, falls into the residue of the estate.

53 Conn., 242, Bristol *vs.* Bristol.

Since these first provisions of the clause are void, whatever is given in the alternative, after the first named appears to be illegal, necessarily fails.

In 17 Rhode Island, 318, Kelly *vs.* Nicholls, a testator devised property to designated persons in trust for a variety of objects—the care of the grounds of his estate; to keep his clock in repair, to entertain ministers of the orthodox Quaker faith, to which he belonged, in his house, and for similar purposes, all of which the court held to be mere acts of liberality or benevolence, instead of charitable uses, and therefore void.

There followed a declaration of a trust which the court held to be valid, in its character, viz., to republish certain writings of the early Friends. But as the previous gifts were void, the further provision as to publishing the books, though valid in its character, was connected with the void trust; and the court, following many decisions in England and in this country, held the entire devise and legacies void. The court, after pointing out in detail the invalidity of the previous disposition, declares: "that these trusts are so controlling in their nature, so unascertainable in their scope, and so inseparable from the trust to publish religious books, that no part of the bequest can be enforced as a charity, and therefore that the whole is invalid."

In 6 Vos., 404, 410, Chapman *vs.* Brown, a gift of a sum in trust to erect a chapel, and if any surplus remains, then to pay it to A, was held void in toto, because the direction as regards the chapel was in contravention of the statute of mortmain, and this legacy failing, no surplus existed; as it could not be inquired into by the court how much the testator wished his trustees to expend for the chapel; which would be necessary in order to ascertain the amount of the probable surplus; which would be necessary in order to ascertain the amount of the probable surplus that the other legatee was to take.

2 Jacob & Walker, 270, Attorney General *vs.* Hintman.

9 Vesey, 535, Attorney General *vs.* Davies.

2 Underhill, section 906.

A Devise for the Colonial Fund and for the Scholarships Is Void Because It Fails to Indicate Who the Beneficiaries Are or How They Are to Be Determined.

Charity or no charity, there must always be some one named or so described that it is ascertainable who is authorized to go into court to enforce the trust. Not only the terms of the trust, but the beneficiary must be certain. 43d Elizabeth allows a broader definition, but while the individual may not be named, the class out of which he is to come must be designated.

In the Colonial Fund there is no attempt to define who is to be the beneficiary, nor what class of the public is entitled to the benefits of the research, nor on what terms they are to be furnished with the results of the investigation, and whether with or without compensation. The authorities declare such a devise, even for a charitable use, to be void, and, for a very much stronger reason, a mere benevolence in favor of nobody in particular is void.

See Tilden Will Case, 130 N. Y., 29, where the court said that the objection is not obviated by the existence of a power in the trustee to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power.

In Fafarge *vs.* McNamaree, 5 Iowa, 124, it is said that there is in general the same necessity for a *cestui que trust* capable of becoming the beneficiary and so pointed out that that there shall be no uncertainty as there is for a properly defined grantee in a deed.

Now, who is the *cestui que trust* of the Colonial Fund or the two scholarships? It is certainly not Georgetown Univerversity. A corporation can neither read nor enjoy the results of the investigations. Who are to be the scholars who

are to receive the benefit of the Scholarship Fund? Are they to be selected by the Trustees from personal regard, because of poverty, because of intellectual brightness, or by competitive examination? Who is it in the District of Columbia that would have a right to maintain a suit for the enforcement of either or all of these benevolences? No doubt, by apt words and the outline of a testamentary scheme, the testator might have made a valid gift along these lines, but he failed to do so. He left his scheme in the air, or, if not, in the breast of Trustees who are no longer in existence, and he left nothing on record by which the court can determine what his wish was. This indefiniteness carries with it a legal penalty which the courts enforce instead of excusing. This indefiniteness would render void these bequests even in those jurisdictions exercising the prerogative power of *cy pres*, and they are, therefore, doubly void in the District where no such power exists.

In Barnes *vs.* Barnes, 3 Cranch C. C., 269, the sum was definite. It did not provide, as here, not exceeding a fixed amount, but there was a devise in trust of $200 per year, to be used in feeding and clothing among poor and necessitous widows and orphans in Georgetown. It was held void.

"In trust for the use of the white ministry and members of the M. E. Church" was too vague.

Trustees M. E. Church *vs.* Trustees Jackson Sq. Church, 35 Atl., 8.

And in Beekman *vs.* Bonsor, 23 N. Y., 298, a devise to executors for a public dispensary for indigent persons, both sick and lame, was held to be so vague and uncertain that no court or trustee could carry out the intent of the testator.

In White *vs.* Fisk, 22 Conn., 21, a bequest was to trustees for the support of indigent and pious young men preparing for the ministry in New Haven. That was held void for uncertainty.

The court said that

> "the bequest is not given to any college or institution, but only as a legal interest to trustees to be expended or dispensed for the support of individuals falling within the description named * * * the difficulty of carrying out this provision is as great as if no trustee had been appointed, for no rule of determination of appointment is furnished by the will, and no positive or discretionary power of determination bestowed."

This case suggests a very simple test for making manifest the vague and uncertain character of these scholarships and Colonial Endowment Fund. Suppose there had been no trustee named, but the testator had simply given so much money for a scholarship, without more, who would there have been to claim the money? But it is said that a trust never fails for want of a trustee. Very true; but a charitable trust is never maintained merely because there is a trustee. It takes both the trusteee and the declaration of a trust. The court in some instances may supply the want of a trustee by appointing a successor; but no court has ever undertaken to supply the declaration of the trust, and no court has ever appointed a trustee where the testator left it to his own nominated trustee to fix the amount of the trust fund and to declare or see to the application of the fund.

In this case the defendants are forced to ask the court to do both. They ask that a successor shall be appointed to take the place of those who are dead and resigned; that these substituted trustees shall exercise the personal trust conferred on their predecessors, and then that the court will go further and declare the trust, determine what Colonial History is to be examined, what sort of archives are to be purchased, copied, and preserved, what shall be the test of admission to the scholarship, how much is to be set apart as a fund for the scholarship, how much the scholars are to be

paid, and whether these scholars are to be selected by lot, by favor, or by competition.

No such power has ever been exercised by a court of equity, and we respectfully submit in conclusion (1) that the gift to Georgetown College is a gift to the Society of Jesus; (2) that the Colonial Endowment Fund is not a charity, but a benevolence, void for uncertainty of purpose and of beneficiary; (3) that the scholarships are benevolences, void because the amount of the bequests are uncertain, because the beneficiaries are not designated in such manner that they can be determined by the court, and because there is no way of knowing who the testator intended to take, and (4) that the gift to the hospitals are void because gifts to a religious order, and the amounts to be given are vague and uncertain and were not fixed by the testator or by his designated trustee.

Respectfully submitted.

J. R. LAMAR,
For Appellant, Mrs. Eleanora D. Speer.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 153

ELEANORA D. SPEER, ETC., APPELLANT,

vs.

MICHAEL J. COLBERT, TRUSTEE, ETC.

BRIEF ON BEHALF OF THE APPELLEE, MICHAEL J. COLBERT.

GEORGE E. HAMILTON,
M. J. COLBERT,
For Appellee.

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ELEANORA D. SPEER, ETC., APPELLANT.

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Brief on Behalf of the Appellee, Michael J. Colbert.

I.

STATEMENT OF CASE.

This is an appeal to this Court from a decree of the Court of Appeals of the District of Columbia, passed on the 12th day of October, 1904, reversing a decree of the Supreme Court of the District of Columbia passed on the 21st day of May, 1903, construing the will of Ethelbert

Carroll Morgan, deceased. Ethelbert Carroll Morgan died on the 5th day of May, 1891, leaving a will, which is filed with an exhibit with the bill, and which appears on page 14 of the record. The will was dated April 22, 1891, less than one calendar month before the death of the testator. After various small legacies and bequests, the testator directed that all the rest and residue of his individual estate should go to his trustees, with directions to pay the income to his two sisters, Eleanora Speer and Minnie Mosher, during their lives, and if the said two sisters should both die, leaving no issue living at their deaths, then his trustees should convey all such residue and remainder in his individual estate to "Georgetown University, in the District of Columbia, to be an endowment in equal shares of literary and medical departments thereof." The will further provided that the trustees should hold all the testator's estate which came to him under his father's will, and to pay therefrom the sum of $10,000 to "Georgetown University, in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto and known as the James Ethelbert Morgan fund."

The testator further directed that a sum "not to exceed $5,000" should be applied and expended under the personal supervision of his trustees in the purchase and erection of a chime of bells, and either a side altar or a memorial window, or a bell and either a side altar or a

memorial window, for some one Catholic church, said church to be designated by his mother by her last will or otherwise, and if she should fail to do so, then the trustees should carry out the trust and donate the same to some Catholic church, giving preference, if there should be one, to a church built by the Jesuits. In this same clause of his will the testator further directed that if this gift should be void, he directed that said sum not exceeding $5,000 should be equally divided between St. Vincent's Orphan Asylum and St. Joseph's Orphan Asylum in the City of Washington.

The testator further directed that a sufficient sum, not to exceed $3,000, should be invested and the income applied to maintain a scholarship in the study of medicine, preferably in Georgetown University, otherwise in some medical college in the District of Columbia, to be known as the E. Carroll Morgan Scholarship.

The testator further directed that the sum of $5,000 should be used to form a fund to be known as the E. Carroll Morgan fund or scholarship, to be applied as he might thereafter verbally indicate to his trustees, or if he failed to do so, as his trustees, with the advice of proper persons, might decide, to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department of the University of Georgetown, in the District of Columbia; that the qualifications under both or either of the last two clauses of his will should be that the applicant should be born in the District of Columbia, and at the time or within a year a student in a

Catholic school or a public school of the District of Columbia, and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

Mrs. Speer, a sister of the testator, filed her bill in the Supreme Court of the District of Columbia on the 5th day of March, 1901, attacking the validity of the bequests to Georgetown College on the ground of misnomer, on the ground that the corporation known as the President and Directors of Georgetown College is a religious sect, order or denomination within the meaning of the Maryland Bill of Rights (see page 8 of the Record) and, therefore, all the legacies to that institution were void because one calendar month did not intervene between the date of the will and the date of the testator's death. The bill of complaint makes numerous other attacks upon the validity of the will, but we assume that the appellant in this Court relies only upon the claims made in the brief, and these are briefly stated as follows:

First: That Georgetown College is a religious sect, order or denomination.

Second: That the corporate title of Georgetown University is "The President and Directors of Georgetown College" and the institution is named in the will as Georgetown University, or the University of Georgetown.

Third: That the bequests to the asylums are void because the asylums are a religious sect, order or denomination.

Fourth: That Georgetown College had not chartered power for the prosecution and research of colonial history in the State of Maryland or elsewhere, and for various other reasons mentioned on page 20 of the appellant's brief.

Fifth: That the bequests in the will for the establishment of scholarships are void for uncertainty and because the amount in one instance, at least, is of a sum "not exceeding $3,000."

II.

ARGUMENT.

There is practically no dispute between the parties to this litigation about the facts, nearly all of which are admitted by the answer and the only dispute will be about the legal conclusion to be drawn from the admitted facts. The Supreme Court of the District of Columbia held in substance that the devise and bequest to the trustees of the testator's estate, exclusive of that which came to him from his father, was valid and effectual, and that if the two sisters of the testator should both die leaving no issue at their deaths, then all the testator's estate, except the specific bequests, and excluding that which came to him from his father's estate, should pass to the President and Directors of Georgetown College in the District of Columbia, to be an endowment in equal shares of the literary and medical schools connected with the University of Georgetown, and that the corporation known as the President and Directors of Georgetown College were entitled to receive the same. The Court

further held in its decree that the clauses and sub-clauses of the will, designated in the bill of complaint as clauses C, D, E, F, G and H, were each and all of them void and invalid and of no effect, and that all said void and lapsed legacies fell into the residuum of the testator's estate and passed to the beneficiaries under the terms of the residuary clause of said will, designated in the bill as clause one. The case was taken to the Court of Appeals and the judgment of that Court was that all the legacies and bequests contained in the will were good, except the bequest of a sum not to exceed $5,000 to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, the erection of an altar or memorial window, &c., for some one Catholic church in the District of Columbia, but that the alternate bequests of said sum of $5,000 was good. The Court also held that the bequest of $5,000 to form a fund to be known as the E. Carroll Morgan fund or scholarship for the maintenance of a scientific department or the foundation and application of the income to a scholarship in the classical department of Georgetown University, was void for the reason that the bequest or direction was uncertain and incomplete and impossible of execution. We will take up the discussion of these various objections in their order.

The two opinions to be found in the record, being the one delivered by Mr. Justice Hagner of the Supreme Court of the District of Columbia, and beginning on page 87 of the record, and the opinion of Chief Justice Alvey, of the Court of Appeals of the District of Colum-

bia, beginning on page 126 of the record, are so elaborate and review the authorities so fully that it is hardly necessary to repeat the citations in this brief, and we, therefore, content ourselves with the discussion of the questions presented to this Court for review upon general principles.

(1)

Is the corporation, the President and Directors of Georgetown College, popularly known as Georgetown University or the University of Georgetown, a religious sect, order or denomination

We respectfully submit to the Court that were it not for the fact that this proposition is seriously contended for by distinguished counsel, it might be very properly characterized as startling. Georgetown College was incorporated by an act of Congress, approved June 10, 1844, and found in Sixth Statutes at Large at page 912. That act provided as follows:

> "Section 1. That there be erected in Georgetown in the District of Columbia a college for the instruction of youth in the liberal arts and sciences, the name, style and title of which shall be the President and Directors of Georgetown College.
>
> "Section 2. That James Ryder, Thomas Lilly, Samuel Barber, James Curley and Anthony Ray be, and they are hereby declared to be, a body politic and corporate, with perpetual succession in deed or in law to all intents and purposes whatsoever, by the name, style and title of 'The President and Directors of Georgetown College,' by which name and title they and their successors shall be competent at law and in equity to take to themselves and their

successors for the use of said College any estate whatever in any messuages, etc., goods, chattels and other effects, etc., by gift, bequest, devise, etc., and the same to grant, etc., for the use of said College in such manner, etc., and to receive the same, their rents, etc. and to apply the same for the proper use and benefit of the said College; and by the same name to sue and be sued, implead and to be impleaded in any court of law or equity in all manner of suits, actions and proceedings whatever, and generally by and in the same name to do and transact all and every of the business touching or concerning the premises, etc.

"Section 3. That the said corporation shall adopt a common seal under and by which all deeds, diplomas and acts of the said College or corporation shall pass and be authenticated, and the same seal at their pleasure to break and alter or devise a new one.

"Section 4. That no misnomer of the said corporation shall defeat or annul any donation, gift, grant, devise or bequest to or from said corporation.

"Section 5. That said corporation shall not employ its funds, or income or any part thereof, in banking operations, or for any purpose or object other than those expressed in the first section of this act, and nothing in said act shall be construed to prevent Congress from altering, amending or repealing the same."

Prior to this act of incorporation, on the 1st day of March, 1815, Congress passed an act entitled "An Act concerning the College of Georgetown in the District of Columbia." That act, as stated by Mr. Chief Justice Al-

vey in his opinion, did not profess to be an act of incorporation, but it did confer authority upon the president and directors of the College of Georgetown to confer degrees and faculties in arts, sciences and liberal professions, to which persons are usually admitted in other colleges or institutions of the United States, and to issue diplomas or certificates to testify the admission to such degree. Subsequently to the Act of June 10, 1844, Congress has on at least one occasion by legislative declaration recognized the existence of Georgetown College, and prior to 1844 authorized the grant to that institution of large amounts of property which have been sold off by the college from time to time, and there are now in the District of Columbia thousands of land titles dependent upon the lawful incorporation of that institution and the lawful grant to it of large amounts of valuable property in the City of Washington, District of Columbia. The Court is referred to the following acts of Congress in support of this statement;

See Statutes-at-Large, Vol. 11, page 265;
Statutes-at-Large, Vol. 6, page 538.

The only testimony offered by the complainant in support of the allegations of her bill that Georgetown College is a religious institution as distinguished from an educational institution is the testimony of the President of the University, and of certain documentary evidence in the way of catalogues, etc., introduced by the complainant, and certain books of instruction used in the school. Father Daugherty, the president, testified

in substance that the business of Georgetown College was to teach young men just as they are taught in any other college. In his testimony on behalf of the defendants, beginning at page 70 of the record, it is made to appear that the University of Georgetown is composed of the college or the undergraduate school, of the medical department, subdivided into two branches, namely, the dental and the medical branches, and the law department; that there is no school of theology connected with Georgetown University; that in addition to the undergraduate school they have a preparatory school, and a post-graduate course; that no distinction is made in the reception of students between Catholics and non-Catholics. That perhaps one-half, and certainly one-third of the students in the law and medical schools are non-Catholic. He further states that it is specially provided and set down that there shall be no exclusion from any branch of the University on account of religious belief. He further stated that the only religious instruction given in the school is that there is a a catechetical lesson in religion, and one lecture a week lasting from thirty to thirty-five minutes, on the subject of Christian doctrine, based upon the tenets of the Catholic religion. Whatever may be the extent and nature of the religious instruction given by the authorities of Georgetown College to its pupils, the only corporate powers which can properly be exercised by Georgetown College are to be found within the limits of the Act of Congress of June 10, 1844, incorporating that institution. The act of Congress provided that this institution should

have the right to instruct young men in the liberal arts and sciences; that they might take and dispose of property; that they might sue and be sued, grant diplomas, etc. In other words they were authorized to become an educational institution whereby young men should be instructed in the liberal arts and sciences, just as is the case with every other institution of a similar nature in the District of Columbia. The act of Congress says nothing about religious instruction or denomination of instruction. It simply happens that the people in control of this corporation created by Congress belong to a particular faith of religion or denomination, and whatever may have been the views of other courts or other individuals upon this subject, the question for us, we submit, is foreclosed by the decision of this Court in the case of Bradfield v. Roberts, 175 U. S., 296. In that case it was plain that the institution very well known in Washington as Providence Hospital was a sectarian institution.

The Court in that case said:

> "Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of such church, are wholly immaterial as is also the allegation regarding title to its property. The statute provides as to its property and makes no provision for its being held by any one other than itself. The facts above stated do not in the least change the legal

character of the hospital or make a religious corporation out of a purely secular one, as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious denomination, or of no organization at all, is not of the slightest consequence with reference to the law of its incorporation, nor can the individual belief upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of a Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. * * * It is simply the case of a secular corporation being managed by people who hold to the doctrine of the Roman Catholic Church, but who, nevertheless, are managing the corporation accord- to the law under which it exists. * * * All that can be said of that corporation itself is that it has been incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to."

In the case at bar, we repeat, all that can be said is that Georgetown College is a corporation created by an act of Congress, its duties and its powers and franchises must be found within the four corners of that act. If it has been exceeding its powers under the act of Congress,

Congress or the courts have the right to correct that abuse of power, and Congress has expressly reserved to itself the right to alter, amend or repeal this charter. It is not for the complainant to complain of it The act of Congress does not prohibit the institution from giving religious instruction to its students. It does not prohibit the institution from attempting to instill good principles into its students, or from doing what seems to be complained about in the opposing brief, that is to say, to saving men's souls. Chief Justice Alvey was of the opinion that the decision of the Supreme Court of the United States in the case of Bradfield *v.* Roberts, was conclusive of this question, and no showing, it seems to us, has been made to make the present case distinguishable from the Bradfield case. In this connection it may be said that the same argument will apply to the devise to St. Vincent's Asylum and St. Joseph's Asylum. The bill alleges, on page 11 of the record, that these institutions were sectarian. This allegation is not proof. The charters of the two institutions are found on pages 40, 41 and 42 of the record. These institutions were both created by act of Congress.

Section 5 of the act of Congress of February, 25, 1831, incorporating St. Vincent's Orphan Asylum, provides that this institution might receive destitute children, male or female, and that the corporation should have power to bind any child under its care for the purpose of acquiring a knowledge of some useful trade, occupation, or profession, and that it might establish a school for children who are unable to pay for their education. In other

words, Congress authorized the establishment of an asylum for the care and maintenance and education of destitute children. To call such an institution a religious or sectarian institution is to our minds the statement of a monstrous proposition. There is absolutely no word of proof in the record to sustain such a charge. In like manner the charter of St. Joseph's Male Orphan Asylum provides that certain gentlemen should be incorporated for the purpose of charity and education. To say that such an institution, without a word of proof upon the subject, is a sectarian institution, is equally as monstrous. We submit that Georgetown College is an educational institution, and not a sectarian or religious institution, and that, therefore, the provisions of the Maryland Bill of Rights, as modified by the act of Congress, have no application to this case.

(2)

It is next contended that, assuming that Georgetown College is not a religious sect, order, or denomination, still the bequests are void by reason of a misnomer in the will. It would seem a complete answer to the claim to quote Section 4 of the act of June 10, 1844, which provides that no misnomer of the said corporation shall defeat or annul any donation, gift, grant, devise, or bequest to or from the said corporation; but if that were not sufficient, it appears from this record that Dr. Ethelbert Carroll Morgan was a member of the faculty of the medical department of Georgetown University. He was not a lawyer, and perhaps not sufficiently familiar with the

necessity of mentioning corporations by their correct corporate title. It does not appear that this instrument was prepared by a lawyer. On the contrary, it would seem to be manifest, from a mere reading of it, that it was prepared by a layman, and perhaps by the testator himself. It does appear that the language of the will from beginning to end is not precise or technical, and indeed, not accurate from the standpoint of a lawyer, but the only question in this connection for this Court to determine is, did he sufficiently identify the object of his bounty? When he said the University of Georgetown did he intend the object of his bounty to be the institution, the technical corporate title of which was "The President and Directors of Georgetown College?" It seems to us that the mere statement of the proposition is its own answer, but we are not left to inferences on that point. The answers which have force and effect of proof state explicitly that the corporation is popularly known in the City of Washington and generally throughout the United States as Georgetown University, or the University of Georgetown, or Georgetown College, and that it was the institution legally known as the President and Directors of Georgetown College, and no other, that was named as beneficiary under the Morgan will. The President of the University, in his testimony, beginning on page 69 of the record, says that the institution is known as Georgetown University, or the University of Georgetown, or Georgetown College, or simply as Georgetown, just as the institution known as Harvard or Pennsylvania would be referred to. Can it be seriously contended that

a devise or bequest to Yale University, an institution located at New Haven, in the State of Connecticut, would fail because the corporate title of the institution was the Corporation of Yale University? We submit that there is no force or merit in the contention and that the particular bequests, under discussion, to Georgetown University are not void by reason of the alleged misnomer. The authorities upon this subject are all collected, and are to be found in Judge Hagner's opinion, at pages 98, 99, and 100 of the record. The true rule undoubtedly is as stated in 1 Redfield on Wills, chapter 10, section 41, as follows:

> "It is never required that all particulars of name or description of person or thing should be precisely accurate in order to the validity of the provisions of a will. It is always sufficient that the courts, after learning the surrounding facts and circumstances, should be able with reasonable certainty to declare the intent of the testator."

Can this Court have any possible doubt after being informed that Dr. Morgan was a resident of the District of Columbia at the time of the making of his will, that he was a professor in the medical department of Georgetown University; that there is no other institution in this part of the country, or any part, that is known as Georgetown University? Can this Court have any possible doubt that Dr. Carroll Morgan intended to benefit the institution on Georgetown Heights, and no other? We submit that there can be but one answer to that question.

(3)

The bequests to the two asylums have been sufficiently considered in discussion of the first two points which we have argued, and it is believed that no further argument need be made as to the validity of this alternate bequest. The appellee in this case concedes, and it was conceded in both Courts below, that the bequest of $5,000 for the purchase and erection of a chime of bells, and either a side altar or memorial window, etc., for some Catholic church in the District of Columbia, is void, for several reasons, but we do claim that the alternate bequests over to the two asylums are perfectly good and should be sustained.

(4)

Is there any power in Georgetown University to prosecute a study of the colonial history of Maryland and the District of Columbia, and to obtain and to preserve archives and papers relating thereto, and to see to the application of the same? The Supreme Court of the District of Columbia held that this testamentary disposition was void, for the reason that Georgetown College had no chartered power which authorized it to make any research into the colonial history of Maryland or elsewhere. The court below uses the very singular argument that it does not appear that any student connected with the College would ever derive the slightest benefit from any result that might arise from the prosecution of the researches so vaguely referred to. Upon the same theory and by the same argument it might be held that the College had no right to purchase books upon any his-

torical subjects, for the reason that it would not appear that any of its students might derive any benefit from such purchase. By the terms of the law of its creation, Georgetown College was founded for the purpose of instruction of youth in the liberal arts and sciences. How can youth be instructed in the liberal arts and sciences unless there be persons competent to instruct them, and how can those persons make themselves competent to instruct youth in the liberal arts and sciences unless they equip themselves by proper study and research? The training of the teacher is just as important, and perhaps more important, than the training of the student. The Supreme Court in its opinion referred to the case of Jones v. Habersham, reported in 107 U. S., at page 189, where the Court said:

> "There is some ground for holding that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents and works of art, with other such books and works to be selected by the officers of the society and purchased out of the surplus income, and that the purposes of the trust are, in the words of Mr. Justice Story, germane to the objects of the incorporation, and relate to matters which will promote and aid and perfect these objects."

The Supreme Court of the District of Columbia dismissed this branch of the case very summarily, and cited no authority to sustain the proposition that an institu-

tion like Georgetown College or any other institution, devoted to the instruction of youth, can not equip itself by making researches into the history of the very place where it is located, and by equipping its teachers for the purpose of enabling them more properly to perform the duties imposed upon the corporation by its charter. It is difficult to see how the nature of the research or the character of the archives could be more accurately or more definitely stated. The testator evidently intended that the institution should inquire into the colonial history of Maryland and the District of Columbia, which was at one time a part of the State of Maryland. How could he designate or define more accurately the nature of the research? The Court of Appeals reversed the Supreme Court of the District of Columbia upon this proposition and in this connection Chief Justice Alvey uses the following language:

> "The cultivation of historical research would seem to be a part of liberal education, such as should be encouraged by a college intended to confer degrees upon students in acquiring a liberal education in the arts and sciences. We have many learned discourses upon the philosophy of history and the term *science* is of a very large meaning in an educational point of view. Acknowledged truths and laws, in any department of mind or matter, digested and arranged into a system; a profound or complete knowledge of all acknowledged truths relating to any subject-matter. This is the definition of science, and it would seem to be

> comprehensive enough to embrace an inquiry into a matter of history, as a means of arriving at and establishing the truths of history, truth being the foundation of science. But even if it be thought that research in matters of history be not within the matter of the charter of the College, still, it is within the purview of the act, and germane to the objects and purposes of the incorporation."

We submit that the construction of the Court of Appeals placed upon this legacy of $10,000 is the proper one, and that its decision in that regard should be affirmed.

(5)

Are the two bequests, one of $3,000 and one of $5,000, for the purpose of founding scholarships, the first in the medical department of Georgetown University, and the second for the foundation of a scholarship in the classical department of Georgetown University, void?

The first objection raised to the bequest of $3,000 is on account of the uncertain amount directed to be expended. The language of the will is a sufficient sum not to exceed $3,000 shall be applied, etc. The direction is that a sufficient sum shall be expended. If the entire fund of $3,000 is necessary for the purpose then the entire sum will be expended. If a less amount is required for the purpose of establishing the scholarship, the difference between the amount of $3,000 and the amount actually necessary or actually expended would fall into

the residuum of the estate. It is stated by Mr. Justice Hagner in his opinion, that the trustees were directed to pay and see to the application of an indefinite sum, to be withdrawn from the residue of the estate to furnish an income for a scholarship in the study of medicine. We submit that this is not the proper construction of the language of the will. The testator says that the amount to be expended shall be a sufficient sum, and the law regards that as certain which can be made certain. It is true that scholarship is to be established in some university, preferably Georgetown University.

We contend further that the legacy of $5,000 for the purpose of forming the E. Carroll Morgan scholarship is a valid bequest. The amount is specifically named, the purpose is named with a sufficient degree of certainty, that is to say, the trustees are directed to select on proper advice, the establishment of a scientific department, the foundation of a scholarship in the classical department of the University of Georgetown. The beneficiary is clearly defined and named, and the trustees are given the discretion to do one of two things in the use of this fund. It is difficult to see upon what theory this legacy should not be sustained. It is true that there has been no appeal to this Court of the defendants, the individual members of the board of directors of Georgetown College, or by Michael J. Colbert, one of the substituted trustees. The only appellants in this Court are Eleanora D. Speer and James Mosher, one of the substituted trustees and Anna M. Mosher, but if the

decree of the Court of Appeals of the District of Columbia in this respect is properly before this Court for review, we submit that this legacy of $5,000 should be sustained. In all other respects it is submitted that the decree of the Court of Appeals of the District of Columbia is correct and should be affirmed.

GEORGE E. HAMILTON,
M. J. COLBERT.
For Appellee.

Supreme Court of the United States.

No. 153.—October Term, 1905.

Eleanora D. Speer, in her own behalf and by Emory Speer, her husband and next friend, James Mosher, one of the substituted trustees under the last will and testament of Ethelbert Carroll Morgan, deceased, and Anna M. Mosher, Appellants.
vs.
Michael J. Colbert, one of the substituted trustees under the last will and testament of Ethelbert Morgan, deceased, et al.

Appeal from the Court of Appeals of the District of Columbia.

[January 2, 1906.]

One of the appellants, Mrs. Speer, on the 5th of March, 1901, filed this bill in her own behalf and by her husband and next friend, Emory Speer, in the Supreme Court of the District of Columbia to obtain a judicial construction of the will of her deceased brother, Ethelbert Carroll Morgan, who died, testate, on May 5, 1891, a resident of the District of Columbia. Answers to the bill were duly filed and the Supreme Court gave judgment construing the will, which, upon appeal to the Court of Appeals of the District of Columbia, was reversed, and judgment was entered, construing the will, by the Court of Appeals. From that judgment Mrs. Speer, together with some of the parties defendant in the suit, appealed, and brought the case here for review.

The will in question was executed on the 22d day of April, 1891, and the testator died May 5, 1891. He was never married, and left as his next of kin and heirs at law two brothers and three sisters, viz: James D. and Cecil Morgan, and Mrs. Speer, the plaintiff in this suit, and Mrs. Anna M. Mosher and Mrs. Ada M. Hill. He appointed William J. Stephenson and John H. Magruder the executors and trustees of his will, the former of whom subsequently died and the latter resigned, and Michael J. Colbert and James Mosher were duly appointed by the court as substituted trustees under the will. The estate of the testator was treated by him in his will as consisting of two parts, that which he had himself accumulated and that which came to him through the will of his father, who died in June, 1889. His own accumulations amounted to a little over twenty-three thousand dollars, while the estate which he received from his father somewhat exceeded fifty-five thousand dollars, the total being a trifle over seventy-eight thousand dollars. The estate of the deceased had

been received by the substituted trustees, Colbert and Mosher, when this bill was filed by Mrs. Speer against them, and also against Mrs. Anna M. Mosher, the wife of James Mosher, and a sister of the testator, and also against the two corporations incorporated as St. Vincent's Orphan Asylum and as Trustees of St. Joseph's Male Orphan Asylum, both being in the District of Columbia, who were made parties because, as the plaintiff alleges in her bill, they claim to be the beneficiaries under the clauses of the will of the testator, leaving a legacy to be equally divided between St. Vincent's and St. Joseph's Catholic Orphan Asylums in the city of Washington, and in order that they might make proof of their identity, if any existed, with the St. Vincent, and also with the St. Joseph Catholic Orphan Asylums, mentioned in the will, and that they might be bound by the adjudication which might be made by the court in all respects hereafter; and also against John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker and Edward I. Devitt, who, the plaintiff alleged, claimed to be, by succession, the President and Directors of Georgetown College, and who, as such, claimed an interest in the estate of the testator, under the clauses of his will mentioning Georgetown University, in the District of Columbia, and the plaintiff alleged that they were made defendants in order that they might make proof of succession to the original incorporators of Georgetown College, and that their claims to the legacy mentioned in the will might be adjudicated by the court. The bill alleged that the will of the testator was duly admitted to probate in the proper court in the District of Columbia. After making certain provisions, not here material, the will of the testator is as follows:

"All the rest and residue of my estate real, personal and mixed of which I am now possessed or shall possess at my death (other than my share under my father's will of which I would become possessed at my mother's death) I give bequeath and devise to my trustees hereinafter named and their heirs and assigns with full power to sell convey mortgage and reinvest, in trust nevertheless to apply the income and profits to the use and benefit of my sisters Eleanora Speer wife of Emory Speer and Minnie Mosher wife of James Mosher in equal parts during their lives and at their death to deliver and convey each sister's share to her issue and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her

"And if my said two sisters shall both die leaving no issue living at their deaths I direct my said trustees to deliver and convey all the said rest and remainder of my estate (excepting my share aforesaid under my father's will) to Georgetown University in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof

* * * * * *

"And I hereby give bequeath and devise any and all the estate real personal and mixed devised to me under my father's will and to which I become entitled to have and possess upon my mother's death to my trustees

hereinafter named their heirs and assigns forever with full power to sell convey mortgage encumber and reinvest in trust nevertheless to pay and see to the application of

"First the sum of ten thousand ($10000) dollars to Georgetown University in the District of Columbia to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

"Second a sum not to exceed five thousand ($5000) dollars to be applied and expended under the personal supervision of my trustees to the purchase and erection of a chime of bells and either a side altar or memorial window or a bell and either a side altar or a memorial window for some one Catholic church . . . said church to be in the District and to — designated by my mother by her last will or otherwise and if she fail so to do I direct my trustees to carry out this trust as a memorial of my mother Nora Morgan and donate the same to some Catholic church . . . giving a preference, if there be one, built by the Jesuits. And in event this clause & gift be void I direct said sum not exceeding $5000 five thousand dollars shall be equally divided between Saint Vincents' and St. Joseph's Catholic orphan asylums in the city of Washington.

"Third. A sufficient sum not to exceed three thousand dollars the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship.

"Fourth, the sum of five thousand ($5000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as I may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department, in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

"And lastly as to all the rest and residue of my aforsaid share of my father's estate my said trustees their heirs and assigns shall hold the same for the benefit of my aforesaid sisters Ellenora and Minnie upon the same limitations conditions remainders and powers and in the same manner as the trustees under my father's will, will then hold retain and possess the 'remainder' and bulk of the respective shares of my said two sisters I wish my brother Cecil to have my share of my father's library I nominate and appoint William J. Stephenson and John H. Magruder my executors and trustees of this my last will and testament.

"In witness whereof I have signed and sealed and published and declared this as my will this 22nd day of April, 1891."

The plaintiff alleged that the bequest and devise to Georgetown University, upon the death of the two sisters, without issue living at the time of their death, were void, because, as alleged, there was no such incorporated

institution in the District of Columbia as Georgetown University, capable of taking the bequest and devise, and also upon the ground that, assuming there was a simple misnomer, and that Georgetown College was meant instead of Georgetown University, yet, even upon that assumption, Georgetown College was incapable of taking the devise and bequest, because it was under the supervision and control of the Order of Jesuits, and that the college was therefore a sectarian institution. It was also averred that the bequest of $10,000 to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, "was void, upon the same ground, and also because there was no charter power or authority in Georgetown College (assuming that institution to be meant) to receive the bequest." Also that the bequest of a sum not to exceed the amount of $5,000, to be applied and expended under the personal supervision of the trustees, for the purchase and erection of a chime of bells, etc., was void, as was also the alternative bequest of an amount not to exceed that sum for the benefit of the two Catholic orphan asylums, in the city of Washington, the alternative bequest being void on the ground that those asylums were under the charge and control of persons belonging to religious orders, and therefore incapable of taking the bequest, and on the further ground that the amount of the bequest was uncertain. The bill averred also that the remaining bequest, of a sum not to exceed $3,000, and also the bequest of $5,000, for the purpose of maintaining and founding scholarships, etc., were void, because of their uncertainty and the want of clearly defined conditions under which the funds should be applied. The defendants answered the bill and none of them conceded the validity of the claims made therein. Colbert, one of the substituted trustees, and also John D. Whitney and others, for and on behalf of the president and directors of Georgetown College, and also the trustees of St. Joseph's Male Orphan Asylum and of St. Vincent's Orphan Asylum, all claimed the validity of the bequests contained in the will, while the answer of Mosher, the other substituted trustee, simply expressed his willingness that the provisions of the will of the testator should be given effect and carried out, only so far as they were legal and valid.

On the trial proof was taken in regard to the name and corporate status of Georgetown College, claiming the devises and bequests made to and on behalf of Georgetown University.

The Supreme Court, in an elaborate opinion, (reported in 31 Washington Law Reporter, 630, 646,) held that the devises and bequests to trustees named in the will, of the testator's estate, exclusive of that which came to him under the will of his father, were valid and effectual. The court also held that all the clauses and subclauses in the will of the testator, disposing of property acquired by the testator under his father's will, were void, and

that the property therein spoken of became part of the residuum of the estate of the testator, and vested in the beneficiaries entitled to take under the residuary clause of the will. The Court of Appeals, upon review of this judgment, held that the clauses of the will were valid, except the bequest of "a sum not to exceed five thousand dollars," to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, and the erection of an altar or memorial window, etc.; but the alternative bequest of the sum not to exceed five thousand dollars, to be equally divided between St. Vincent and St. Joseph's Orphan Asylums in the city of Washington, was good. It also held that the clause in the will, providing for the application of five thousand dollars to form a fund to be known as the E. Carroll Morgan fund or scholarship, to be applied as "I [the testator] may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide, to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia," was void. No appeal has been taken from this last portion of the judgment of the Court of Appeals.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The opinion of the Court of Appeals, in this case, delivered by Chief Justice Alvey, (24 App. Cas. D. C. 187,) is entirely satisfactory to us, and leaves little to be said in addition. For the purpose, however, of simply stating the opinion of this court upon the various questions, without discussing them at length, we add what follows.

The appellants insist that the gift of the property to the Georgetown University is void, as having been made to a sectarian institution less than one calendar month prior to the testator's death, and that such disposition was therefore in violation of section 457 of the Revised Statutes of the District of Columbia. That section makes valid and effectual all sales, gifts and devises prohibited by the thirty-fourth section of the Declaration of Rights of the State of Maryland, adopted in 1776, "provided, that in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." (14 Stat. 232; passed July 25, 1866.) The thirty-fourth section of the Maryland Bill of Rights makes void:

"Every gift, sale or devise of lands to any minister, public teacher or preacher of the gospel as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination; every gift or sale of goods or chattels to go

in succession or take place after the death of the seller or donor, to or for such support, use or benefit, and also every devise of goods or chattels to or for support, use or benefit of any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination, without leave of the legislature."

It is also insisted that there is a misnomer of the corporation, now claiming the right to the bequest, inasmuch as such corporation was incorporated under the name of the "The President and Directors of Georgetown College," while the bequest is to "Georgetown University, in the District of Columbia." It is contended that Georgetown College is a corporation, incorporated on the 10th of March, 1844, under an act of Congress, (6 Stat. 912, entitled "An act to incorporate Georgetown College, in the District of Columbia,") and that there was and is another institution in Georgetown, sometimes called the University of Georgetown or Georgetown University, which was distinct from the college incorporated under the above-mentioned act of Congress, and not covered by it, and that the testator knew of this so-called university, that he was a professor therein, and that such university was, at the time of the testator's death, a sectarian institution within the thirty-fourth section of the Maryland Bill of Rights above mentioned. The fourth section of the above act expressly provides that no misnomer of the corporation shall defeat or annul any donation, etc., to the corporation. We agree with the Supreme Court and the Court of Appeals of the District of Columbia in the opinion that there was not, at the time of the execution of his will by the testator, or at the time of his death, any incorporated institution existing as Georgetown University or University of Georgetown, separate and apart from, or having powers other than, those granted to "The President and Directors of Georgetown College," by the act of Congress of 1844, above cited. It appears in the evidence that this college was frequently spoken of as Georgetown University, and known as such, but the evidence entirely fails to show that there were two incorporated institutions, the one, "Georgetown University," and the other "The President and Directors of Georgetown College." And we have no doubt that the testator meant the corporation called Georgetown College when he used in his will the word university. He meant to give the property to a corporation, and to one that could take it, and the evidence shows there was no other corporation of that kind. Upon this question the Court of Appeals said: "It was expressly alleged in the bill as a fact that there is no such incorporated institution as Georgetown University, though Georgetown College is frequently referred to and spoken of as Georgetown University, notwithstanding it has never been incorporated as such. It is simply a popular designation applied to the college. It is alleged in the bill that the defendants Whitney and others, under the name of president and directors of Georgetown College, in this District,

claim to be the beneficiaries entitled to the legacies mentioned in the will of the testator as for Georgetown University. It is not attempted to be shown that there was, or is, in this District any such incorporated institution of learning as "Georgetown University," separate from and independent of "Georgetown College." It was not to any unincorporated so-called institution that the testator intended to leave the property, but to one that was incorporated and capable of taking a legacy.

Various acts of the legislature of Maryland were referred to on the argument, particularly the act of 1792, chapter 55; that of 1797, chapter 40; the act of 1805, chapter 118; that of 1808, chapter 37; also the act of Congress of March 1, 1815, chapter 70, (6 Stat. 152,) entitled "An act concerning the College of Georgetown in the District of Columbia;" also that of March 2, 1833, (6 Stat. 538,) in which the Government grants certain lots in Washington city to the college above referred to. These various statutes were cited for the purpose of showing the validity of the claim that an institution called Georgetown University, as distinct from Georgetown College, was meant in the will of the testator. In regard to these particular acts we think they do not bear upon the case other than, as remarked by the Court of Appeals, to show the origin and growth of Georgetown College, and to identify the early foundation of the school with the president and directors of Georgetown College, as that institution was fully and completely incorporated by the above-cited act of Congress of March 10, 1844. That act must be resorted to as the measure of the powers and duties, as well as to define the character, of the corporation created thereby. (*Bradfield* v. *Roberts*, 175 U. S. 291.)

Taking the character of the college from the act of Congress, we are of opinion that it is not a sectarian institution or within section 34 of the Maryland Bill of Rights. The reasoning upon this subject (as well as that upon the alleged misnomer of the college) set forth in the opinion of the Supreme Court, (31 Washington Law Reporter, 630,) and in that of the Court of Appeals, is entirely satisfactory, and we concur therein.

There is, in our judgment, no merit in the contention that the persons claiming as president and directors of the college are not the legal successors of the original incorporation. There is no evidence that the same has been dissolved. The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved by the mere failure to elect trustees. We do not think that in this case there was any failure to elect, nor was there any dissolution.

We now come to the consideration of the validity of the disposition made of the testator's property, which came to him from the will of his father. The testator gives and bequeaths all of that property to his trustees, thereafter named, in the will, and their heirs and assigns forever, "with full power to sell, convey, mortgage, incumber and reinvest, in trust

nevertheless to pay and see to the application of: First, the sum of ($10,000) ten thousand dollars to Georgetown University in the District of Columbia, to be used and held as an endowment, for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund."

Aside from the objections to the bequest to Georgetown University already considered, a further objection is made, and the disposition is alleged to be void, because there is no charter power in any institution which could take under this bequest that authorizes it to prosecute such research and obtain and preserve the archives relating thereto. It is well said, in the opinion of the Court of Appeals in this case, that the act of incorporation of Georgetown College in 1844 confers "corporate power upon the institution for the instruction of youth in the liberal arts and sciences, and also clothes the corporation with power to take any estate whatsoever, in any lands, etc., or goods chattels, moneys and other effects, by gift, bequest, devise, etc., and the same to grant, convey or assign, and to place out on interest for the use of said college and to apply the same thereto. The cultivation of historical research would seem to be a part of a liberal education, such as should be encouraged by a college intended to confer degrees upon students in acquiring a liberal education in the arts and sciences." In *Jones* v. *Habersham*, (107 U. S. 189,) it is said that "A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purpose of its creation, although such as it might not by its charter or by general laws have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school or an asylum."

Although it is, under the will, the duty of the trustees therein named to exercise supervision over the administration of the fund, nevertheless the death or resignation of the trustees named in the will cannot, and does not, defeat the bequest. There is not such a personal trust as renders it necessary to have the personal action of the trustee named in the will, and the trust does not fail upon the death or resignation of the named trustee. The court may appoint his successor. (*Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 99 etc.)

Both courts below have held the bequest of a sum not to exceed five thousand dollars, to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, etc., to be void. We agree with those courts in that respect. We also agree with the views of the Court of Appeals, holding that the alternative bequest of this same sum, not to exceed five thousand dollars, to be divided equally between the two orphan asylums, is valid. There is no material misnomer

in either case, although they are incorporated institutions, one by the name of St. Vincent's Orphan Asylum and the other as St. Joseph's Male Orphan Asylum in the city of Washington, and they are referred to in the will simply as St. Vincent's Orphan Asylum and St. Joseph's Catholic Orphan Asylum.

Nor does the bequest violate the thirty-fourth section of the Maryland Bill of Rights, already referred to. The same reasoning on that point governs this bequest as is applicable to the bequest to the University of Georgetown. Neither of these orphan asylums is a sectarian institution under the acts of incorporation. The other objection made is that the clause directs that a sum, not exceeding five thousand dollars, shall be equally divided between these orphan asylums; and it is said that there is such uncertainty in the amount of the bequest as to render it impossible to execute it, that it might be fulfilled by dividing a dollar between the asylums, or any other sum, within the five thousand dollars named in the bequest. But it seems to us that the intention of the testator is clear to give the full sum of, but not to exceed, five thousand dollars. That is, he gives five thousand dollars to be equally divided between these two asylums. While the amount is not to exceed five thousand dollars, the direction for an equal division, taken in connection with the other facts, render it in our opinion clear that the intention of the testator was that that sum should be the amount of the bequest. Courts are always reluctant to hold a bequest void for uncertainty, and they only do it when actually compelled to do so by the language used. (*Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. *supra.*) If the testator had really intended that any less sum than five thousand dollars should be disposed of by and equally divided under this clause in his will, he would have said so.

Objection is also made to the bequest of "a sufficient sum, not to exceed three thousand ($3,000) dollars, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship." The first objection, as to the uncertainty of the amount of the bequest, we do not regard as meritorious. It is a sum sufficient to found a scholarship, and it shall not exceed, in any event, $3,000. If one can be founded, within the conditions named in the will, for a less sum than $3,000, then that less sum only can be used. The discretion to be exercised by the trustees in selecting the college with which to connect the scholarship does not render the bequest void. The testator has, by this clause in his will, himself expressed his preference for Georgetown College, if the scholarship can be maintained in that institution, but if not, it is to be a scholarship in some medical college of the District. This, we think, is not an improper or uncertain disposition of the bequest, or an illegal placing of a discretion in the trustees under the will. See *Attor-*

ney General v. *Gleg*, (1 Atk. 356;) *Attorney General* v. *Fletcher*, (5 L. J. [N. S.] 75;) 2 Perry on Trusts, 4th. Ed. sec. 721.

The last bequest objected to is that of five thousand dollars, to form a fund known as the E. Carroll Morgan fund or scholarship, to be applied as the testator might thereafter indicate to his trustees, etc. This has been declared void by both courts, and no appeal has been taken from the judgment of the Court of Appeals adjudging that item to be void. That bequest being adjudicated invalid, the fund provided for therein forms part of the residue of the testator's estate, and passes under the residuary clause of the will.

These views call for an affirmance of the judgment of the Court of Appeals, with costs to the several parties, to be paid out of the residuary fund, as provided for by the judgment of that court.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.